CHICAGO BAR
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CHICAGO BAR ASSOCIATION
73102

432 - 24785

216 I.A. 621

JOHN F. S. LINDSTROM,
Appellee,

vs.

FREDERICK W. SOULTER,
Appellant.

Appeal from
Superior Court,
Cook County.

216 I.A. 621

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff below, who is appellee here, sued the defendant in an action on the case, alleging a conspiracy between defendant and others, by which defendant was arrested, and falsely charged with the crime of disorderly conduct and malicious mischief.

The case went to trial on the fourth count, which charged that on the 13th day of November, 1914, plaintiff was assaulted by the defendant, appellant, and compelled to go with him to a police station, and there imprisoned and detained by force without any reasonable or probable cause. The defendant filed the general issue and a special plea, in which he set up that at the time in question, he was a police officer in the employment of the City of Chicago; that plaintiff, with another man, was repairing a building known as 4718 North Paulina street, Chicago; that defendant requested them to produce a permit; that plaintiff replied that they had no permit; that he, defendant, then told them to cease the w which they refused to do, whereupon he arrested the plai

The material facts are not disputed. Plaint been appointed receiver of the premises in question Superior Court of Cook County. The defendant (a was a party to the proceeding in which said r

made, claiming an interest in the premises. On November 13, 1914, plaintiff, with a workman under his direction was working on the building when defendant came along and asked plaintiff what he was doing. Plaintiff then took from his pocket a copy of the order of the court by which he was appointed a receiver of the premises. Defendant said he did not give "a damn" for the paper, and pulled his revolver on the workman, who was on the roof of the porch, and said "I will give you just two minutes to come down." Thereupon plaintiff was taken by defendant to the Robey street police station and was not released until about five or six o'clock that night. Defendant was not on his regular beat at the time, and was not wearing a policeman's uniform. He had a star on his vest, however, which he exhibited to plaintiff.

At the conclusion of the evidence the court directed a verdict for plaintiff and the jury brought in such a verdict assessing damages.

The principal contentions of appellant are that the court erred in instructing the jury to find for the plaintiff and in refusing to receive in evidence certain sections of 229 and 230 of the building ordinances of the City of Chicago. The sections offered are not preserved in the bill of exceptions. We cannot take judicial notice thereof, and therefore, cannot determine whether, conceding a violation of the ordinance by plaintiff, he would have been subject to arrest therefor. The arrest was conceded. The burden was on defendant to justify.

Appellant cites us to Corpus Juris, Vol. 5, page 407, paragraph 32 B. B. to the effect, -

> "At common law and except as modified by statutes any officer charged with preserving the public peace may arrest without a warrant any person who is committing a breach of peace in his presence. Citing Cahill v. People, 106 Ill. 621; Shanley v. Wells, 71 id. 78."

We do not question the rule there announced but it is not applicable to this record, for the reason that there is no evidence tending to show a breach of the peace by plaintiff at the time in question.

The judgment will be affirmed.

AFFIRMED.

441 - 24794

ANNA G. CONKLIN,
Appellee,

vs.

JOHN M. HOFFMAN et al.,

On Appeal of JOHN M. HOFFMAN,
Appellant.

Appeal from
Circuit Court,
Cook County.

216 I.A. 621

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued in assumpsit for money claimed to be due on an agreement of the defendant to pay her $2,000 for her services in procuring a contract for a switch track to be placed on defendant's land. The case was tried by a jury which brought in a verdict for plaintiff for the full amount of her claim, and on this verdict the court entered judgment.

In October, 1910, plaintiff, who previously resided in Chicago, was living on a farm at Montague, Michigan. She came to Chicago in response to a letter from one W. S. Barbee, who was then engaged in the real estate business, and who wrote her, " * * * I have a matter that you might take up for me, that would make you several hundred dollars." Upon her arrival in Chicago, she was introduced by Mr. Barbee to the defendant Hoffman. She testified: "Mr. Hoffman said that if I could get that switch, that he would pay me $2,000, but he said, 'It is a hard proposition. I have had several people trying to get this switch track, and they have failed.'" She further testified defendant told her the property was sold to the Robinson Coal Company, that she took up the matter of the contract for a switch with Mr. Clarence A. Knight, in whose office she was formerly employed; that defendant furnished

her with an abstract of the title of the property, which was examined by Mr. Knight at her request; that Knight called up Mr. Hetzler, the president of the Belt Line Railway Company, and asked him to do all he could to aid plaintiff in getting a contract for the switch; that the chief engineer of the road was called in consultation on the matter, several plans for the switch submitted, and as progress was made, she reported to defendant and his associate Mr. Barbee, and after ten days or two weeks of efforts, procured a contract for the switch track, with a collateral or subsidiary agreement which was submitted to defendant Hoffman, and after being referred by him to Mr. Barbee, was accepted.

These agreements are in evidence and tend to corroborate the testimony of the plaintiff. The agreement for a switch track is dated November 10, 1910. It is signed by the Belt Railway as party of the first part and W. S. Barbee as party of the second part. A plat showing the proposed switch is attached thereto. The collateral agreement of the same date is executed by the same parties and recites that a coal chute is about to be constructed on the premises, and contains particular covenants as to the manner in which it may be constructed. By a writing on the back of the original contract it appears the same was assigned to defendant by Barbee May 29, 1912.

On the other hand the defendant testified, and in this is corroborated by Barbee, that the only agreement with the plaintiff was that she should in conjunction with Barbee, endeavour to sell the property, and that if a sale was effected for the price asked ($24,000) plaintiff and Barbee were to receive $4,000 as compensation for their services.

The principal contention of the defendant is that

the verdict is against the weight of the evidence. It is urged that in conformity with the rule laid down in Peaslee v. Glass, 61 Ill. 94, this should be considered a case where the jury should not give a verdict on the unsupported testimony of the plaintiff, when that testimony is denied by evidence of the defendant equally credible. We do not question that rule, but do not think it applicable, where, as here, the plaintiff is corroborated by written evidence and her testimony is more probable and reasonable than that of the defendant. We have examined this evidence in detail, and neither that of defendant nor of his only other witness, who was his office associate for twenty years, gives us the impression of reliability. The latter, for instance testified positively, "I don't remember anything about a coal chute. If I did, I would tell you," when shown an unsigned copy of the agreement made for the same. Later, the original agreement was produced with his signature thereon showing his knowledge. When questions were put to the defendant, tending to show that proposed sales of the property had failed because of the lack of switch tracks facilities, he evaded, and when the court put the direct question, "Was the subject of switch tracks ever discussed in the matter of these so-called 'nibbles' ", he replied:

> "Oh, I never undertake to sell property myself. It was always through agents, and I have no doubt but what those agents had talked about the availability of a switch, but as far as I am concerned myself, I never talked with the parties principal about the property."

The jury evidently considered the evidence submitted for defendant as evasive and unreliable. We are not able to say it was not justified in so doing.

It is claimed the court erred in admitting evidence of the financial standing of defendant. This evidence, however,

was brought out as parts of conversations with the defendant in regard to the payment of plaintiff's claim, which conversations were clearly admissible.

It is also claimed that the court erred in refusing to admit a copy of a letter written by defendant to an attorney who had represented plaintiff in the prosecution of her claim. For two reasons this copy was properly rejected. In the first place a proper foundation for the introduction of it was not laid, and in the second place, the letter itself was a self-serving document.

Appellant also argues that there was error in one of the instructions given. The instructions are not all abstracted but we have examined the one complained of and think it was not erroneous.

The judgment will be affirmed.

AFFIRMED.

certiorari denied

449 - 24802

FRANKLIN MacVEAGH & COMPANY, a corporation, Appellee, vs. LOUIS J. GROSS, Appellant.	Appeal from Superior Court, Cook County.

216 I.A. 621

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment for plaintiff entered upon the verdict of a jury, which verdict was directed by the court at the close of all the evidence.

The declaration was the common counts and the affidavit which was attached, stated that the suit was for an unpaid balance due plaintiff on account, for money loaned and advanced during the years 1913 and 1914, together with interest thereon. A bill of particulars filed showed twenty-six debit items against the defendant, amounting to $8,500.08, and twenty-four items of credits, amounting to $7,046.68, showing a balance of $1,453.40, upon which plaintiff claimed interest at five per cent per annum, from January 1, 1915. The defendant pleaded the general issue and a special plea in which he set up the making of two written contracts with plaintiff, whereby defendant was employed during the years 1913 and 1914, and by the terms of which defendant was allowed a drawing account of $354.17 per month, which the plea averred amounted in law to an agreement that the drawing account should be a minimum salary, that the debits in plaintiff's account were all items of this drawing account. At the conclusion of the evidence, the plaintiff having remitted an item of $35.00 there was left no material disputed issue of fact. Defendant was in the employ of plaintiff for about fifteen years, immediately prior to the termination of his

Judgment modified 12-17-14

employment by his own resignation on the first day of January, 1915. During the years 1913 and 1914 the terms of his employment were set forth in similar written contracts covering each year. These contracts provided that defendant should devote all his time to the service of the plaintiff and clause 3 provided, "As compensation to said party of the second part Franklin MacVeagh & Co., agree to pay him as follows, a commission equal to forty per cent of the selling percentage on each item of their selling lists, sold by him or sold to his customers through mail order or in the House * * * ." In clause 5 it was provided that the commissions should be reported to the defendant monthly, and if unsatisfactory to him, he might at once rescind the contract by giving notice in writing, and defendant waived the right to question the figuring on his commissions unless he gave notice of his desire so to do, within ten days after receiving a monthly statement charged. Clause 7 provided that defendant should be held and regarded only as an employe of the company "whose compensation is measured and payable in the manner herein provided and not otherwise."

These contracts were in the usual printed forms, but before execution thereof, plaintiff's president in each case wrote thereon with a pen, "drawing account $354.17 per month." Each month during the two years plaintiff advanced the said sum to defendant, and at the end of each month rendered to him an account in which defendant was charged therewith and credited with the amount of commissions earned, and when, as was usually the case, the amount drawn was larger than commissions earned, he was charged in the statement with the balance due, and this balance was always carried forward on his account for the next month. Defendant knew how the account stood all the time.

The account rendered November 1, 1914, showed defendant debtor to a balance of $1,039.04. This balance against him was

increased by further similar deficits for November and December to $1,453.40.

On March 22, 1915, plaintiff sent defendant a statement showing a debit balance of $1,453.40, and asked that a settlement should be arranged. With reference thereto defendant testifies: "I was very much surprised when I received that letter on March 22nd, 1915. I supposed the figures were the same, as I had all the early statements. I was surprised I got that statement, because I did not expect to get a statement under the circumstances I was working there. I was expecting that he would make me a present of that balance as he had in other years."

In the four or five previous years of defendant's employment the commissions earned did not equal the total amount of the drawing accounts. He was never asked to pay the balances and did not repay them. In 1912 there was a balance due defendant of $122.85, which was paid by plaintiff's check.

The defendant urges the proposition of law here, that the granting by an employer to an employe of a drawing account, where the employe is paid a commission and not a stipulated salary, without a definite agreement requiring the repayment of any part of said drawing account advanced in the event sufficient commissions are not earned to cover the amount drawn, makes such drawing account a minimum salary. In support of this contention he cites Gannon v. Tyree, 148 Ill. App. 99; Hermann v. Uhry, 187 Ill. App. 32.

The contracts there construed differed materially from those before us in that they clearly showed that it was the intention of the parties that the drawing account should be a minimum salary. We do not think such intention can in this case be inferred either from the written contracts or the mode of dealing. Beck v. West, 87 Ala. 213; Farrell v. Burbank, 57 Minn. 395,

59 N. W. 485. It should be remembered that there was no evidence offered in this case tending to show that the term "Drawing Account" had a definite and fixed meaning in the trade and that it meant a guaranty of commissions. This was the controlling fact in Christopher v. Hecheimer, 127 Mich. 451, where a contract somewhat similar was so construed. In the absence of such proof the rule is otherwise.

The judgment will be affirmed. Menage v. Rosenthal, 187 Mass. 470.

AFFIRMED.

513 - 24867

AUGUST SCHWANDT,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, THE SOUTHERN STREET RAILWAY COMPANY, and CALUMET & SOUTH CHICAGO RAILWAY COMPANY, corporations, doing business under the name and style of Chicago Surface Lines,
Appellants.

216 I.A. 621

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff recovered a judgment of $2500 in an action on the case for personal injuries.

The case was submitted to the jury under two counts of the declaration, one of which charged generally that the defendants carelessly and improperly drove their car, injuring plaintiff while he was in the exercise of due care, and the other that defendants drove their car at an unreasonable rate of speed. The defendants filed the general issue.

The principal circumstances attending the injury are not disputed. The accident occurred July 19, 1916, at about 6.45 o'clock in the evening, and in the City of Chicago, at the intersection of North California avenue and Barry avenue. California avenue is a public street extending north and south. Barry avenue is a public street, extending east and west, and intersecting North California avenue at right angles. Defendants operated a double street car line on North California avenue. Northbound cars ran over the east tracks. Southbound cars ran over the west tracks.

Plaintiff lived at 3105 North California street. His

home was on the east side of the street and the third lot north of Barry avenue. He owned three teams and wagons, which were kept in the rear of his home. Thereewas a building south of his residence and the southeast corner lot was vacant. In the rear of his home was an alley leading to the barn where the teams and wagons were kept.

At the time in question he was driving a single horse hitched to an empty wagon, and was on his way home after the days work. He was fifty-six years of age and was an experienced driver. The horse was blind.

The plaintiff did not testify to the facts of the injury. The claim was made on his behalf that his memory had been impaired as a result of the accident. The evidence further shows that he was driving south and in the southbound track on California avenue, that as he approached the intersection of California avenue and Barry avenue he turned to the left and on the northbound track, at the north cross walk of Barry avenue, and before he got across, was struck by a heavy "pay-as-you-enter" car of defendants which was run at a speed of from twenty to twenty-five miles per hour.

Appellants have argued that a preponderance of the evidence indicates that the accident happened without negligence on their part. We have examined the evidence bearing on this point and think the contention cannot be sustained.

A more serious question is raised under the contention that plaintiff was guilty of contributory negligence. Defendants offered in evidence a certaion section of the Code of Chicago, entitled Rules of the Road, as follows:

> Section 2484, Art. 5. "Before turning the corner of any street or public way, the driver or person in possession, charge or control of any vehicle being driven or propelled around such corner, shall give a signal by raising his hand or whip, so that such signal can be plainly seen from behind such vehicle and from the side towards

> which the turn is to be made, and such signal shall be given in a manner which shall plainly indicate the direction in which such vehicle is about to turn. In turning corners to the right, vehicles shall turn to the right of the center of the street, in turning corners to the left, vehicles shall also pass to the right of the center of the intersection of the two streets."

It is undisputed that plaintiff did not comply with the provisions of this ordinance either by raising his hand or whip at the time he was about to cross the street or in passing to the right in the center of the intersection of the two streets. It is claimed that this could not have been the proximate cause of the injury, because the intention of plaintiff to turn into Barry avenue became known to the motorman on defendants' car in time to have avoided the accident. This, however, is not the law as has already been held by our Supreme Court in West Chicago Street Railway Co. v. Liderman, 187 Ill. 463. We think that plaintiff was thus guilty of negligence that contributed proximately to cause his injury and that we must so hold as a matter of law. White v. East Side Mill & Lumber Co., 164 Pac. 736; Elgin Dairy Co. v. Shepherd, 108 N. E. 234.

The judgment will therefore be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

513 - 24867

FINDING OF FACT.

We find as a fact that appellee, August Schwandt, was guilty of negligence which contributed to the injury complained of and for which he sues.

247 - 25124

JOHN J. BURKE, etc.

vs.

H. A. ANDERSON et al.

JOHN J. BURKE et al.,
Appellees,

vs.

LOUIS SUSSMAN,
Appellant.

Appeal from

Superior Court,

Cook County.

216 I.A. 622

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis Sussman from an order which approved and confirmed the report of sale and distribution made by a Master in Chancery under a decree of sale.

The decree was entered in a proceeding brought by certain claimants for mechanics' liens. The decree found the amounts respectively of these liens, and that they were all subject to the liens of one Mary E. Cook, trustee, in certain trust deeds, which deeds were not, however, foreclosed in the proceeding.

The premises which were directed to be sold were situated in the City of Chicago, County of Cook and State of Illinois, and described as lots 6, 7, 8, 9 and 10, in block 3, in Frank Wells & Company's Boulevard Subdivision.

The decree found that one Morris Yablong had a lien on lots 9 and 10, which lien was superior to all liens except those of Mary E. Cook; that appellant Sussman had a lien upon lots 6, 7 and 8, which lien was inferior to the lien of Mary E. Cook and also to the liens of all the mechanics' lien claimants. These claimants were found to have a lien upon all of said lots for the respective amounts due to them.

The decree directed that the Master should sell the real estate and pay the Yablong debt from the proceeds of the sale of lots 9 and 10 and report any deficiency if the proceeds were insufficient, and if there was any surplus, use the same, together with the proceeds of lots 6, 7 and 8 in satisfying the mechanics' lien claimants. It also provided that if there was a further surplus that the Master should pay the same to the defendant Louis Sussman. In case there was any deficiency as to any of the claimants, the Master was to so state.

The Master reported the execution of the decree, setting up the steps taken in detail, and stating that he had offered each of the lots described in the decree separately, whereupon no bid was made; that he had offered any combination of lots less than the entire number and had especially offered lots 6, 7 and 8 in combination and also lots 9 and 10 in combination, whereupon no bid was made; that he offered any part or portion of the premises less than the entire premises, whereupon no bid was made; that he then offered the entire premises described in the decree, whereupon Joseph Pearson offered and bid the sum of $20,167.42 in cash, and that, being the highest and best bid, he sold the same to him.

The report further showed the application of the purchase money as provided by the decree. The claim of Morris Yablong was paid in full, there was not sufficient left to satisfy the mechanics' lien claims. The receipts of the parties were attached to the report, showing the respective payments made.

On the same day this report was filed, appellant filed written exceptions in which he set up that the sale as held, was not for cash, and in support of the exceptions filed an affidavit setting up that he was present at the sale and that all the parties had left the salesrooms, but no money had up to that time

been paid, that he pointed this out to the Master, who replied that he was satisfied with the responsibility of the purchaser and that the matter would be cleaned up at the Master's office on the same day. A petition setting up the same alleged facts, substantially, was filed by appellant. The Master was sworn as a witness, and his testimony, which is uncontradicted and supported by the receipts of the parties entitled to the money, showed that the purchase price was fully paid in cash. The court thereupon overruled the exceptions and approved the report.

Appellant first contends that the sale was not made for cash. The Chancellor heard the evidence and, we think, correctly found that this contention was not sustained. Appellant raises the further objection that no deficiency decree was entered in his favor. The Master reported the facts. It does not appear from the record that appellant made any motion for the entry of a deficiency judgment in his favor. Further, as he filed no cross bill he was not entitled to such a judgment even had the motion been made. White v. White, Jr., 103 Ill. 438; Babcock v. Farwell, 189 Ill. App. 279.

Appellant finally argues that the distribution made under the sale was improper. This objection was not made below and is not assigned for error here. The sale and distribution seem to have been substantially as directed by the decree and the decree itself is not before us for review.

The order approving the report of sale and distribution will be affirmed.

AFFIRMED.

25330

G. A. COPP (Inc.), a corporation,
Appellee,

vs.

GIDEON A. COPP,
Appellant.

Interlocutory
Appeal from
Superior Court,
Cook County.

216 I.A. 622

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an interlocutory order denying a motion of defendant to dissolve an injunction, whereby he, Gideon A. Copp, was forbidden to carry on the business of general carpentry and contracting under the name G. A. Copp, or any other name or style containing this or any part thereof so similar to the title "G. A. Copp, Inc." as to permit confusion therewith, within the limits of the city of Chicago, also from soliciting customers of complainant, and from inserting or advertising in the classified telephone directory of the Chicago Telephone Company or the general directory of the City of Chicago, of the name G. A. Copp or similar name with designation attached, indicating that defendant is engaged in general carpentry or contracting business or other business closely allied therewith, from "opening or maintaining a place of business at No. 885 Rush street, Chicago, Illinois, under the name of G. A. Copp, or any other name or title containing the words 'G. A. Copp or sufficiently resembling the same' to be confused with the corporate title of the complainant herein", and generally, from doing anything to injure or depreciate the good will of the business conveyed to the complainant by said G. A. Copp or any act intended to result in unfair competition by misleading the public.

The motion to dissolve was in the nature of a demurrer to the bill and the facts therein alleged must be taken as true. The question to be decided therefore, is whether the order for injunction was justified under the facts as stated.

The material allegations of fact are that on or about the 1st day of March, 1917, defendant was engaged in the business of general carpentry and contracting at No. 821 Rush street, in the City of Chicago, that negotiations were entered into by certain persons named predecessors in interest of complainant for the purchase thereof, and that on the 16th day of March, 1917, a contract in writing was entered into, between defendant and said persons, whereby defendant sold and conveyed said business, including all property except the personal tools and effects and including the "good will attached to said business, said bill of sale or conveyance to be made to the corporation hereinafter described and hereafter to be organized" for a consideration of $3000 to be paid.

The third clause of the writing provided the vendees therein agreed to form and organize as soon as possible, a corporation to be known as G. A. Copp, Inc., for the purpose of carrying on said business, to which corporation the property was to be conveyed. The vendor covenanted for himself, his heirs and assigns etc., that the vendees, their successors etc., "shall have the right to use the said name herein above specified, during the legal existence of said corporation, and that he himself will not within two years from April 2, 1917, at any place or location within a radius of three miles from said 821 Rush street, Chicago, Illinois, establish a shop or place of business or become associated with any such shop or place of business for the purpose of doing carpentry work, building contracting, mill work, jobbing carpentry, or any other

form of business that he is now or has been carrying on at the premises herein before described, nor will he solicit, either directly or indirectly, or take business from any person, firm or corporation now a regular customer of said vendor at 821 Rush street, except with the consent of G. A. Copp, Inc."

In another part of the contract it was agreed, "said vendor further agrees to assist in every possible way the said vendees in maintaining the good will of said business and in retaining the old customers connected therewith, and to co-operate wherever possible with the said vendees to enable them successfully to carry on the business hereby contracted to be conveyed."

The said corporation was incorporated about April 2, 1917, and defendant made and delivered to the incorporators for the corporation a bill of sale in which the personal property was described and conveyed, and it was also therein stated "intending to convey the general carpentry and contracting business, located at 821 Rush street, in the City of Chicago and State of Illinois, now owned by the grantor herein, also including the good will attached to said business."

These instruments were executed under seal. The complainant took possession, and has ever since held continuous possession and continuously carried on said business at said place. At the time of negotiating these transactions, the personal property other than good will, was considered to be of the value of $1,500 and the defendant represented that he was a man of sixty years of age and wished to retire to a farm. With the bill of sale defendant also delivered a list of his customers, and an announcement of the change in the ownership of the business was sent to each of said customers by mail.

The business has since increased and the good will of it has become inseparably attached to the corporate name and the use of complainant's name is essential to maintaining said business. The bill alleges that now, in violation of the written agreement and bill of sale, and with the intent to injure the good will of complainant and deceive the public, generally, defendant "has formed the intention, and plans, unless restrained, to open up and maintain under the name of G. A. Copp, a place of business at No. 885 Rush street, in the City of Chicago, where he will maintain and carry on the business of carpenter and contractor * * * the said Gideon A. Copp has caused to be mailed * * * " to many customers a certain printed announcement in words and figures as follows, viz:

> "G. A. Copp, carpenter and contractor, desires to announce that he will resume business, May 1st, 1919, 885 Rush Street, phone, Superior 522, (after May 1) where he will be fully equipped to serve his patrons with the same efficiency as in the past. Residence phone, Graceland, 4704, Remodelling, repairing, cabinet work."

And on the premises at 885 Rush street he has placed a certain sign, containing in large and plain lettering, the following inscription, "This building will be occupied by G. A. Copp, carpentry, repairing and alteration, metal work, furnace repairing."

The bill further alleges that by means of this, the customers have become confused, and that further damage will result unless the defendant is restrained.

It is the contention of the defendant, appellant here, that because the contract in the case had an express covenant, by which the defendant agreed not to conduct a new business in the neighborhood of the old for a period of two years, which agreement has expired by its own limitations, the implied

covenant that the voluntary vendor of the good will may not do anything to lessen the value of the good will by solicitation of customers, Trego v. Hunt, 12 Eng. Ruling Cases, 442, 65 L. J. Chancery, 841; Ranft v. Reimers, 200 Ill. 386; Von Bremen v. MacMonnies, 200 N. Y. 41, 93 N. E. 186, does not obtain, citing Hanna v. Andrews, 50 Ia. 462, and Cottrell v. Babcock Printing Press Co., 54 Conn. 122.

The contract should, if possible, be so construed as to give effect to all its terms. The intention of the parties as gathered from the whole instrument must control. Geithman v. Eichler, 265 Ill. 585.

We cannot ignore the other express and affirmative covenants as above set forth, which must, we think, be regarded as additional covenants to the one which is limited to the two year period.

The principle seems to be well settled, that when a party sells an established business with the right to use his own name in connection therewith, he cannot afterwards resume the name in carrying on the same business. Frazer v. Frazer Lubricating Co., 121 Ill. 157; McFell Electric & Telephone Co. v. McFell Electric Co., 110 Ill. App. 182.

We think the facts alleged in this bill show that the issuing of the interlocutory injunction was within the discretion of the Chancellor.

The order will be affirmed.

AFFIRMED.

MR. JUSTICE BARNES:

I think the order too broad. I do not construe the contract in question to prevent appellant from using his own name in the carpentry business after the time specified, provided the method of its use is not such as to create confusion or violate his covenant respecting good will. But whether he may use his name at all in such business, and whether his use thereof tends to create such

confusion or violates such covenant I conceive to be different questions presented upon this record.

428 - 24781

PATRICK GUILFOYLE,
Appellee,

vs.

WILLIAM F. KRUEGER,
Appellant.

Appeal from
Circuit Court,
Cook County.

216 I.A. 622

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action for malicious prosecution in which a judgment was rendered for plaintiff (appellee) for $2,000 after a remittitur of $3,000. Guilfoyle was arrested by a police officer on Krueger's representations and taken to the police station where in a few hours he was released on bond. Later Krueger swore out a complaint. On the hearing before an examining magistrate Guilfoyle was discharged.

Appellant urges that the verdict was manifestly against the weight of the evidence on the question of probable cause for the criminal proceeding. The principal facts bearing on that feature of the case are:

Krueger was in the business of general milling work and among other things made box spring frames for couches which he sold for $1.50 apiece. In August, 1909, both Guilfoyle's brother-in-law, John McAuliffe, and his father-in-law were in Krueger's employ, the latter as a watchman, the former as operator of the machine that rabbeted the frames. Krueger had invented and used a cutter-head in his work by which the rabbeting was made perfectly smooth. Its work was readily distinguishable from that done usually by a wobble saw, which left rough edges. One morning the latter part of August, 1909, Krueger missed about 3000 feet of the manufactured lumber so

rabbeted by John McAuliffe which had been piled up in a passage-way the night before, and spoke about it the next day to both McAuliffe and his father. They claimed to know nothing about how it disappeared. Krueger reported the circumstances to the police station and requested that the patrol officer keep a watch around his place. A day or two afterwards John McAuliffe quit his employ without notice or explanation, and he and Guilfoyle, (who had been out of employment for the previous three weeks and prior to that time was a saloon keeper most of the time) began making the same kind of frames and sold them to Krueger's customers for 40 cents less a frame. In the early part of October Krueger learning of these facts from certain of his customers who had purchased from them, and that McAuliffe had informed them that he had gone out of business, he inspected the frames sold to them by Guilfoyle and McAuliffe and saw that the rabbeting on them was identical with that made by his machine or device, which he alone used. He then reported these additional facts and circumstances to the lieutenant of police at said station who assigned two policemen to make an investigation. Thereupon they, with Krueger and one Olsen in his employ, went to Guilfoyle's yard and inspected the lumber he was using. They first met McAuliffe. While conversing with him Guilfoyle came forward and, as testified to by Krueger and officer Simon, who made the arrest, told McAuliffe to go back to his work or he would "put his foot in it", and that "whatever talking was done there he would do." When Guilfoyle was asked if he made such a statement he said "I don't remember." While the versions of their conversations as given by Krueger, Olsen and officer Simon differ materially from Guilfoyle's, they are not specially material to determination of the question of probable cause. Krueger claimed to identify some of his lumber among the pieces in Guilfoyle's yard by the rabbeting, pointing out and explaining to the officer the difference therein from

the other pieces that were rabbeted by a wobble saw. The officer asked Guilfoyle if he had a bill for the lumber and testified that Guilfoyle replied "None of your business. This is my property, the lumber is on my property and if you are a police officer you know what to do"; and that the officer then said: "Well, if you can't tell us you will tell some one else". He testified that he thereupon told Guilfoyle to go to the station with him, and took him there to make explanations to the lieutenant of police; that in so doing he acted as a police officer on his own responsibility and received no orders from Krueger as to the arrest, and that Krueger gave none. Later at the suggestion of the police Krueger swore out a complaint charging Guilfoyle with receiving stolen property.

It is immaterial to the question of probable cause whether Krueger was correct in his identification of property he found on Guilfoyle's premises, or that Guilfoyle was discharged on a hearing before the examining magistrate. The question is whether or not all of the foregoing facts and circumstances furnished a probable cause for Krueger's prosecution of the criminal action. If so, we need not consider the question of malice, for an action for malicious prosecution will not lie if there is probable cause whether there be malice or not. (McElroy v. Catholic Press Co., 254 Ill. 290; Ames v. Snider, 69 id. 376.) As for probable cause, "All that is required is an honest belief, or strong ground of suspicion, of the plaintiff's guilt, and a reasonable ground of the belief or suspicion," (Harpham et al. v. Whitney, 77 Ill. 32, 40) and we think the foregoing circumstances furnished reasonable ground for honest belief by Krueger not only that the property he so identified was rabbeted by his machine but that it was stolen from his shop through a criminal conspiracy between McAuliffe and Guilfoyle. While Guilfoyle

testified that he purchased all of that lumber from a lumber concern and had most of it manufactured by another milling company we find nothing persuasive in the evidence to refute Krueger's contention that the style of rabbeting on some of the lumber in Guilfoyle's yard and on the frames sold by him to two of Krueger's customers could be done only by Krueger's machinery. John McAuliffe himself knew of no other machine like it, and admitted that the lumber he rabbeted, which Krueger spoke to him about, was missing that morning, and that he left Krueger's employ almost immediately afterwards, and it was made to appear on plaintiff's cross examination of Krueger that McAuliffe had made a written confession of guilt that was in the possession of plaintiff's attorney.

It is significant that Guilfoyle did not call John McAuliffe as a witness, or Edward Murphy (hereinafter referred to) to corroborate his unsupported statements- except as to malice - as to what took place at the time of arrest. It is difficult to understand why under such circumstances and evidence the jury found for plaintiff unless because they learned that at the hearing of the criminal charge Guilfoyle was found not guilty. As stated in Palmer v. Richardson, 70 Ill. 540:

> "It seems to be difficult for a jury to comprehend that an innocent person may be arrested for a criminal offense, and at the same time the law offers no redress against the person who caused the arrest and prosecution."

The verdict may in part be accounted for by the numerous questions put by plaintiff's counsel on cross examination to lay a foundation for impeachment that was never undertaken. These questions carried the insinuation that defendant's witnesses had testified differently at the other trials, and may perhaps have influenced the jury to believe such was the fact so long as defendant was not called on to deny the inferences. Good faith in putting so

many questions of that character might well be questioned when there was no attempt to prove any of the inferences they were designed to carry."

But there is no question in our minds as to the great preponderance of evidence that in bringing the criminal action Krueger acted in good faith on an honest belief of Guilfoyle's guilt founded on reasonable grounds, and hence that there was overwhelming proof of probable cause for instituting the criminal proceeding.

It appears that on two previous trials a jury had brought in a verdict for the plaintiff, and that the verdicts had been set aside by the trial judge. This court and the Supreme Court have said that where "three juries have found the facts the same way it seems to be eminently proper that there should be an end to the controversy so far as the facts are concerned." (Hinchcliff v. Rudnik, 212 Ill. 569.) We recognize this to be the general rule. But we do not deem it so far mandatory that this court will not exercise its function and duty of examining into the sufficiency of the evidence when error is assigned thereon and it finds the evidence so preponderant against the verdict that to uphold it would not only result in a perversion of justice but tend to deter citizens from instituting prosecutions for violations of laws of the land. (Palmer v. Richardson, supra.) As said in Ames v. Snider, 69 Ill. 381:

> "Where probable cause exists, the State has a right to have every such case investigated. It is no longer a matter of private interest to the party who deems himself injured, but it concerns public justice and the general welfare, and the good citizen has no right to withhold the criminating evidence he may have in his possession."

Few men would be willing to originate a criminal prosecution if after acting on an honest belief founded on reasonable grounds a failure to convict the accused subjected them to the annoyance and expense of an action like this, wherein they might be mulcted

by a sympathetic jury.

It is urged, however, that the evidence is sufficient to sustain a verdict and judgment for false imprisonment. Even if the declaration had been drawn, the case tried and the verdict based upon such a charge, yet again the verdict must be deemed manifestly against the preponderance of plaintiff's unsupported evidence that he was arrested upon defendant's directions. The only persons present on that occasion who testified beside the plaintiff, were called by defendant, and supported in the main defendant's denial of giving any such directions.

A significant fact, which we cannot overlook, bearing upon the credibility of plaintiff's version of what took place at the time of the arrest, is that on the two previous trials he called one Edward Murphy to testify as to what then took place, and although Murphy lived only two doors from him and was present in court at the time of the trial, he did not see fit to call him again but relied wholly on his own recollection of testimony given for him at the former trials by a witness since deceased, whose statements, (as testified to by plaintiff) were not only denied by defendant and some of his witnesses but whose very presence at the time and place of arrest appears from the record to have been denied and brought seriously in question. While an affidavit of Edward Murphy to the effect that both his and the testimony of the deceased witness given at the previous trials was suborned by Guilfoyle, was filed in support of a motion for a new trial and cannot, of course, be considered in any other connection, yet the fact that he made such an affidavit seems to explain why he was not called by plaintiff as a witness.

While we think the motion for a new trial on the ground of newly discovered evidence was properly denied in the absence of any affidavit showing due diligence by defendant and

that he was not apprised of the matters contained in Murphy's affidavit until after the trial, we cannot read this record without grave misgivings as to plaintiff's good faith in bringing this action and as to the reliability of the evidence adduced to support it. In this view of the case other points urged for reversal need not be considered, because the judgment must be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

428 - 24781

FINDING OF FACTS.

We find that appellant, Wm. . Krueger, acted with probable cause in instituting against appellee, Patrick Guilfoyle, the criminal prosecution referred to in the declaration, and that the arrest of appellee, Patrick Guilfoyle, was not made at the direction of appellant, Wm. W. Krueger, but wholly upon the responsibility of a police officer or officers acting in their official capacity.

447 - 24800

J. LEVISON,
Appellee,

vs.

THE NEW CENTURY COMPANY,
a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

216 I.A. 622

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action upon a contract dated January 11, 1918, calling for delivery from appellant to appellee within 30 days of a certain quantity of flour and meal. For failure to deliver the same plaintiff (the appellee) claimed damages. A jury was waived and the finding and judgment were in appellant's favor for $351.80.

A preponderance of the evidence sustains the defense that not only the contract was cancelled pursuant to one of its express provisions but also by mutual consent. The latter fact was sustained by two unimpeached witnesses as against plaintiff's unsupported denial which was impaired by his contradictory evidence, and the admission that he told the salesman that "he need not send this flour."

But regardless of the weight of evidence on that point the cancellation was duly exercised. The contract was subject to the rules and provisions of the "universal sales contract" of the United States Food Administration which was made a part thereof. One provision was that "if the buyer * * * failed to file with the seller within 15 days of the order, shipping instructions permitting the seller to ship at his option within the remaining period of the contract * * * then the seller may, at his option, and upon notice to the buyer, cancel this contract."

On January 28, 17 days after the date of the order, to-wit, January 11, the salesman expressly asked for instructions and plaintiff refused and failed to give them. This is not denied. On January 29 appellant mailed appellee notice of its cancellation of the contract. The receipt of that notice was not denied.

Appellee's position is that because appellant's letter of confirmation was dated January 14, the cancellation, being within fifteen days from the latter date, was premature. The letter confirmed the contract as dated and did not change or affect terms and provisions thereof expressly relating to the date of the instrument. Hence the undisputed fact is that appellee did not file shipping instructions "within 15 days of the date of the order", by reason of which the cancellation was made as authorized.

But the proof also unquestionably shows appellee's consent to and acquiescence in the cancellation; and there was no proof that he ever filed shipping instructions as he was required to do, or was ready, able or willing to accept a delivery. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

447 - 24800

FINDING OF FACT.

We find that appellant, The New Century Company, was not guilty of a breach of the contract sued on, and that appellee, J. Levison, failed to file shipping instructions with said appellant within the time required by said contract, and that by reason of such failure said appellant upon notice thereof given to appellee exercised the option given in the contract to cancel said contract, and that appellee consented to and acquiesced in such cancellation.

495 - 24849

216 I.A. 623

JAMES N. LITSEY,
Appellant,

vs.

ERIC E. SKOGLUND,
Appellee.

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee to recover commissions as a real estate broker, claiming a contract of agency to find a purchaser for appellee's property at the price of $20,000, and that he found a customer ready, willing and able to purchase it at such price. The case was heard without a jury and the issues were found for defendant.

The only question presented on the record is one of fact, namely, whether there was a contract of agency. It is only when the preponderance of evidence is manifestly against the verdict or finding below that this court will disturb the conclusion of fact reached in the trial court. A careful examination of the record reveals no manifest preponderance of evidence for the plaintiff, as appellant contends. The evidence is such that a court might reach a conclusion either way according to the weight given to the different statements of the respective parties and the evidence offered in support of each. But as the versions of the conversations had between the parties when it is claimed the contract of agency was made and when no other person was present are entirely different on the question as to whether there was such a contract, and as there is no direct corroborative proof of the testimony of either of them on that question, and as the trial court had the superior advantage of seeing and hearing all the witnesses, we cannot say that the evidence is so manifestly preponderant against defendant's version of the transaction as to justify

a disturbance of the judgment.

Reaching this conclusion there is no practical purpose to be subserved in detailing the various features of the evidence. Suffice it to say that while defendant was apparently willing to sell for the price stated and so indicated both to plaintiff and his customer, that fact is not inconsistent with a want of plaintiff's authorized agency to act for defendant, whereas there is an apparent inconsistency that defendant would have entered into a contract of agency to sell his property at a time when, as disclosed by the evidence, there was another subsisting contract that gave another party an interest in the land, and the cancellation of which defendant subsequently secured before he actually negotiated a sale of the property.

No questions of law were raised, as appellant argues, by the refusal of the court to hold as a proposition of law either that plaintiff was entitled to recover or that the defendant was indebted to him for a specific sum. Whether he was entitled to recover or defendant was so indebted was the issue of fact raised by the pleadings. These so-called propositions of law presented no distinct principle of law for application to the evidence heard upon that issue.

The judgment will be affirmed.

AFFIRMED.

43 - 24882

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LOUIS RICE,
Plaintiff in Error.

Error to Municipal Court of Chicago.

216 I.A. 623

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted and fined upon an information intended to be based on what is designated as section 17, chap. 111½, Hurd's Rev. Stat. Ed. 1917, under the head of "Public Health". That section provides that the landlord, keeper, manager or clerk of every lodging house, hotel, etc., "shall keep in the office, or other public place therein, a register in which shall be entered the name and residence of every person who becomes a lodger, boarder or a guest in said lodging house" etc., and prescribes what such register shall show. It further provides: "Such register shall always be accessible, without charge, to any officer or duly authorized agent of said State Board of Health", and that any landlord, etc., of such lodging house, etc., violating any of the provisions of the section shall be deemed guilty of a misdemeanor, and liable to a prescribed penalty.

Section 2 of the Act makes it the duty of "all * * * police officers, sheriffs, constables * * * to enforce the rules and regulations that may be adopted by the State Board of Health for enforcing the laws in regard to public health."

The information charges that plaintiff in error Rice, being a clerk of a certain hotel in Chicago, "did then and there unlawfully fail, neglect and refuse to keep a register of said hotel in an accessible place to police officers,

contrary to the form of the statute", etc.; and plaintiff in error was found "guilty in manner and form as charged in the information."

It is contended, and rightly, we think, that the information does not charge a violation of any provision of said section 17. The statute requires the hotel register be kept "in the office or other public place therein", and provides that it shall be accessible, without charge, to any officer or duly authorized agent of the State Board of Health. The information does not charge that a register was not so kept but merely that it was kept "in an inaccessible place to the police officers." Under the language of the information even if the register was kept in the office of the hotel yet unless it was so placed therein as to be accessible at all times to the police officers without any request for its production the landlord or clerk would be subject to a penalty. We do not so interpret the statute. It is the manifest intent of the statute that the persons required to keep such a register as designated shall render it accessible to the proper officers whenever required by them in the performance of their duties in enforcing the rules and regulations of the State Board of Health. But the language of the information is broad enough to cover a situation where the register is temporarily placed in a vault of such office. We apprehend that if it were so placed it would not be regarded as inaccessible unless there was a refusal to produce it. It is not sufficient, therefore, to charge that it was not kept "in an accessible place", nor to state that it was not accessible to "police officers" without it appearing further that access was denied to them while performing the duty of enforcing a rule or regulation of said State Board of Health for enforcing the law. Because there

can be no conviction upon such an information the judgment will be reversed.

REVERSED.

478 - 24832

ANDREW F. HUGHES,
Appellee,

vs.

ST. BERNARD'S HOTEL DIEU,
Appellant.

Appeal from
Municipal Court
of Chicago.

216 I.A. 623

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Municipal Court of Chicago for $2,200, rendered April 15, 1918, after verdict, against the defendant, St. Bernard's Hotel Dieu, a corporation.

The action is one of the first class in assumpsit, commenced on August 18, 1914. In plaintiff's statement of claim it is alleged that his claim is for $2,200, being a balance due for certain plans, specifications and necessary details furnished by him for the erection of defendant's building, St. Bernard's Hotel Dieu, in Chicago, Illinois, and for superintending the erection of said building, according to a certain contract (a copy of which is attached and made a part of the statement of claim and marked "Exhibit A") which said contract was signed by Mother Anne Hopkins, president of defendant, and which said work and services were fully performed by plaintiff and were accepted by defendant; and that by said contract defendant was to pay $4000 and did pay plaintiff on account $1800. Said "Exhibit A" is as follows:

"St. Bernard's Hotel Dieu,
6353 Harvard Avenue,
Chicago, Ill., Aug. 20, 1904.

For and in consideration of furnishing plans, specifications and necessary details for the construction of St. Bernard's Hotel Dieu, located at the east side of Harvard Ave., just north of Sixty-fourth street in the City of Chicago, County of Cook and State of Illinois, and also for superintending the construction of same I hereby

agree to pay Four Thousand Dollars - To-wit:- Twenty-five Hundred for plans, specifications and necessary details and Fifteen Hundred for Superintendence. This contract is made with the understanding that there shall be no extras- plans or drawings for coal shed and one story over laundry, if desired necessary, being included above, also any other changes.
Mother Anne Hopkins, Pres."

In defendant's affidavit of merits, filed October 26, 1914, among several defenses set up is that if such an instrument binding on defendant was in fact made (which was denied) any recovery thereunder is barred by the statute of limitations.

On November 9, 1916, answers under oath by the secretary of defendant, Sister Mary Kelly, were filed to certain interrogatories, in which it was stated that Mother Anne Hopkins was president of defendant on August 20, 1904; that defendant in the early part of the year 1914 first ascertained that Mother Anne Hopkins had signed the instrument referred to in plaintiff's statement of claim as Exhibit A; that defendant's books show that plaintiff was paid the sum of $1,800 but that affiant does not know what for; and that affiant does not know whether or not plaintiff was the architect of defendant's building.

On March 19, 1918, the cause was called for trial. Plaintiff's attorney stated that he desired to file, as a part of Exhibit A to plaintiff's statement of claim, "a copy of an instrument"; whereupon plaintiff, over objection, was given leave to amend said Exhibit A, and defendant's attorney stated that he desired that defendant's affidavit of merits theretofore filed, stand to said amended statement of claim, and an order was entered to that effect. It does not appear from the transcript of the record, however, that any amendment to Exhibit A of plaintiff's statement of claim was in fact filed.

Plaintiff testified that he was a licensed architect in the year 1904, that during that year he had business dealings with

Mother Anne Hopkins, president of defendant, and with Father Bernard P. Murray, one of the directors; that on August 20, 1904, he signed a certain paper and gave it to Mother Hopkins, and that she signed another paper and gave it to him, a copy of which last mentioned paper is attached to the statement of claim as "Exhibit A." Plaintiff's attorney then requested that defendant produce the original of that paper which the witness said he had signed and given to Mother Hopkins, and defendant's attorney replied that defendant did not have, and never had, any such paper. Plaintiff was then shown a paper and asked if that was "a copy" of the instrument referred to, and he replied that it was. He further testified that subsequent to August 20, 1904, he made plans, specifications and details for defendant's building and supervised the construction thereof; that he had been partly paid for his work by three checks drawn by defendant, aggregating the sum of $1800. Thereupon plaintiff's attorney offered in evidence the original paper, dated August 20, 1904, and signed "Mother Anne Hopkins, Pres.", and also "the copy" of the instrument, the original of which plaintiff testified he on August 20, 1904, had signed and delivered to Mother Hopkins, and said papers were marked for identification as plaintiff's Exhibits A, 1 and A, 2, respectively. Thereupon defendant's attorney was allowed to cross examine plaintiff and plaintiff testified, in substance, that his name was not signed to the plans; that he had the plans and specifications drawn by Richard A. Schmidt; that Joe Schweitzer, who was then working for plaintiff, signed the plans as architect; that plaintiff let one contract, the mason contract, to Frank Burke, in which contract, signed by Mother Hopkins and said Burke, plaintiff's name appears as "the architect"; that Father Murray let the other contracts; that plaintiff supervised the erection of the building and was at the building

practically every day; that during the time the building was being erected, however, he was in the employ of the city of Chicago, in the building department, and drawing a salary; that one George Bondry, of plaintiff's office, actually superintended the erection of the building and was on the premises all the time; that the building was fully completed in the Spring of 1905; that plaintiff had heard that Mother Hopkins had died in the year 1908, and that he knew that Father Murray also had died about a year prior to the trial; that he does not know when the instrument, "Exhibit A, 2" was made or who made it; that he dictated it "from memory", sometime during the year 1914, about the time this suit was started, to his attorney, Mr. Hartigan, that "as far as he knows" Mr. Hartigan wrote it down as he dictated it; that after the period of ten years since he saw the original, he dictated it "as near as he could think of it."

Defendant's attorney objected on various grounds to the introduction in evidence of "Exhibit A,1" and "Exhibit A, 2", but all objections were overruled and the papers were admitted in evidence. "Exhibit A 1," as introduced, corresponds with the copy above set forth as "Exhibit A" in plaintiff's statement of claim, and "Exhibit A, 2" is as follows:

> "Aug. 20, 1904.
>
> For and in consideration of Four Thousand Dollars, I hereby agree to furnish plans, specifications and necessary details for the construction of St. Bernard's Hotel Dieu, located at the east side of Harvard Ave., just north of Sixty-fourth street in the City of Chicago, County of Cook, and State of Illinois, and also superintend the construction of same-to-wit: Twenty-five Hundred for plans, specifications and necessary details and Fifteen Hundred for Superintendence. This contract is made with the understanding that there shall be no extras - plans or drawings for coal shed or one story over laundry, if desired necessary, being included above, also any other changes.
>
> (Signed) Andrew F. Hughes."

Several witnesses were called by defendant. Their testimony, except that of Mr. Edward R. Hartigan, attorney for

plaintiff, we deem unnecessary to mention. Mr. Hartigan testified that about one month before the trial his stenographer made the instrument "Exhibit A 2"; and that she copied it from a paper which he gave her.

At the close of all the evidence a motion for a directed verdict for defendant was made and denied. The jury returned a verdict against defendant, assessing plaintiff's damages at the sum of $2,200, upon which verdict the judgment appealed from was entered.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

We are of the opinion that plaintiff's action is barred by the statute of limitations. Section 15 of the Limitations Act provides: "Actions on unwritten contracts, expressed or implied, * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Section 16 of said Act provides: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." Plaintiff's action was commenced on August 18, 1914. The instrument sued on (a copy of which was attached to the statement of claim as "Exhibit A", and the original introduced in evidence as "Exhibit A, 1") is dated August 20, 1904. For aught that appears to the contrary in this record, plaintiff's cause of action, if any he had, accrued upon the completion of the building mentioned, which the evidence discloses was completed in the Spring of 1905. Unless said instrument can be considered as a written contract, or other evidence of indebtedness in writing, said action is barred by section 15 of the Limitation Act. In Conductor's Benefit Association v. Loomis, 142 Ill. 560, 567, it is said:

"A written contract is one, which, in all its terms, is in writing. A contract partly in writing and partly oral is, in legal effect, an oral contract. (Bishop on Contracts, secs. 163, 164) * * A contract cannot be said to be in writing, unless the parties thereto, as well as the terms and provisions thereof, can be ascertained from the instrument itself. If the party to a written contract is not named therein, the contract is defective as containing only a part of the agreement. In such case, the agreement is only partly reduced to writing, because parol proof must be resorted to, in order to show with whom the bargain was made. * * In Plumb v. Campbell, 129 Ill. 101, the instrument, held to be a written contract, contained the names of both the parties thereto. In Ames v. Moir, 130 Ill. 582, one of the reasons, given for holding the instrument therein set forth to be a written contract, was stated as follows: 'From the face of the paper the parties to the contract are plainly indicated.' * * In Plumb v. Campbell, supra, we said: 'If it be true that the agreement, as set forth in writing, is so indefinite as to necessitate resort to parol testimony to make it complete, the law is, that, in applying the Statute of Limitations, it must be treated as an oral contract.'"

Tested by the rules above set forth, we do not think the instrument sued on can be said to be a written contract. It does not contain the names of the parties thereto. Plaintiff's name is nowhere mentioned therein. And it does not on its face disclose any indebtedness to plaintiff, or to whom the sums of money mentioned are to be paid. While the name "St. Bernard's Hotel Dieu" appears, defendant's name as a party does not appear. The instrument "is so indefinite as to necessitate resort to parol testimony to make it complete."

Plaintiff did not commence his action until nearly ten years after the instrument sued on "Exhibit A, 1", was signed by the president of defendant, Mother Anne Hopkins, and about six years after she had departed this life. Although the action was commenced on August 18, 1914, for some reason it was not tried until March 19, 1918. During the interval Father Murray, who, according to plaintiff's testimony, had let all but one of the contracts for the building, had also passed away. On the day

of the trial plaintiff, over the objection of defendant's attorney, obtained leave to amend "Exhibit A" of his statement of claim (which was a copy of the instrument he had originally sued upon) by adding thereto "a copy" of another instrument. This, as it seems to us, had the effect of their stating a new cause of action on two instruments, instead of the one, both of which apparently were executed on the same day, August 20, 1904, and which plaintiff's attorney then contended should be construed together as one instrument. This new action was commenced on the date of the amendment, March 19, 1918. For aught that appears to the contrary from the evidence, plaintiff's cause of action on the two instruments (if construed together as one contract) accrued upon the completion of defendant's building, which, as disclosed by the evidence, was completed in the Spring of 1905. His new action on the two instruments was, therefore, not commenced until more than ten years after the same had accrued, and is barred by section 16 of the Limitations Act.

And, even on the assumption that the amendment could properly relate back to the day the suit was originally commenced, we think that plaintiff's action is barred, for the reason that the alleged original instrument, claimed to have been signed by plaintiff on August 20, 1904, was not produced, and its connection with the original instrument, "Exhibit A, 1", had to be supplied by the oral testimony of plaintiff. Furthermore, plaintiff attempted to prove "a copy" of the alleged original instrument, but the paper produced was not sufficiently shown to be a copy. (Dupuie v. McCausland, 1 Ill. App. 395, 398.) The evidence disclosed that, about ten years after plaintiff last saw the alleged original instrument, he "from memory" dictated a copy of it, "as near as he could think of it," to his attorney;

that "as far as he knows" said attorney wrote it down as he dictated it; that about a month before the trial said attorney's stenographer copied the contents of a certain paper which said attorney had given her. The testimony failed to show that the words dictated "from memory" by plaintiff were correctly transcribed by said attorney, or that the words contained in the paper handed to said stenographer were correctly copied by her.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

492 - 24846

LEE C. SNYDER, Appellee, vs. CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY, Appellants.	Appeal from Circuit Court, Cook County.

216 I.A. 623

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for $2000, rendered after verdict, in an action for damages for personal injuries received by plaintiff on the evening of July 17, 1915, from the collision of plaintiff's automobile, which he was driving, with a street car of defendants at the intersection of Western avenue and 23rd street in the City of Chicago.

Western avenue is a north and south street, on which are two tracks of defendants' railway, northbound cars being operated over the east track and southbound cars over the west track. 23rd street is an east and west street and crosses Western avenue at right angles. The next street south of 23rd street is 23rd place. As stated by plaintiff's witnesses, the width of 23rd street from curb to curb is 40 feet, and the width of the sidewalk on the south side of that street is about 14 feet, so it appears that 23rd street, from the south to the north building line, is about 68 feet wide. The distance from the west curb line of Western avenue to the west rail of the southbound track is about 18 feet. On the southwest corner of 23rd street and Western avenue is a three story building, extending south nearly to 23rd place. On the north-

east corner is a saloon, in front of which on Western avenue is a water trough, about 25 feet north of the corner. The accident happened about 9:45 o'clock in the evening. It was dark. At the northeast corner of the intersection of the two streets there was an arc street light, then burning and throwing a circular light on the street. Between 23rd street and 23rd place there were no street lights, but at the corner of Western avenue and 23rd place there was a similar arc light.

On the trial plaintiff and two witnesses testified in his behalf. Plaintiff testified in substance that about a week previous to the accident he had purchased the automobile, which was a five passenger touring car and was the first he had ever owned; that he was driving, seated on the right front seat; that on his left was John Wehr, and on the back seat were John Stark and Celia Stark; that as he approached Western avenue he was driving east on 23rd street, about 6 feet north of the south curb, and had slowed down to a speed of about 6 miles per hour, but that he at no time stopped; that when he had "just cleared" the three story building he looked to the north and then to the south; that when he looked to the south, the first time, he was about even with the west curb line of Western avenue, and he saw a street car with headlight burning approaching from the south, about 175 feet away, but could not tell how fast it was moving; that when he looked to the south, the second time, his automobile was on the southbound track and the street car was about 125 feet away; that then he proceeded to cross the northbound track; that he knew the street car was coming but thought he "had ample time to cross"; that he again looked to the north and then to the south, for the third time, and the street car was "almost on top of him," and at that time the front wheel of the automobile had just crossed the east rail of the northbound track; that he turned

the automobile "slightly north" and the next instant it was hit about in its center and knocked northeast about 10 or 12 feet, and then was hit by the street car a second time and then he became unconscious; that when he recovered consciousness he was in the saloon at the northeast corner and he saw the automobile, badly smashed, against the water trough; and that he could stop his automobile "in about eight feet when it is going at six miles an hour". It appears that about three weeks after the accident, and before the commencement of the suit, plaintiff made an application to secure sick benefits from a certain beneficiary association, in which application it is stated over him signature, in part: "When I reached Western Ave., I saw a southbound Western Ave. car coming. I slowed up and waited until it passed and then started on crossing Western Ave. I also saw a northbound Western Ave. car about 125 feet south of 23rd street. I having the right of way and thinking the motorman would slow up his car sufficiently to allow me to cross I kept on crossing the street."

John Stark, plaintiff's brother-in-law and a passenger in the automobile, testified in part that when the automobile was approaching Western avenue it was about 6 feet north of the south curb line of 23rd street, and moving east about 6 or 7 miles an hour; that after it had passed the building on the southwest corner he looked to the south and saw the headlight of a street car; that the car "just had passed under the light at 23rd place"; that plaintiff "kept right on going"; that just as the automobile was about to cross the southbound track he looked to the south again and the street car was then, he supposes, about 75 to 80 feet away; that when the automobile was about in the middle of the northbound track he again looked and the car was "right on top of us"; that at this time the automobile was going east about in the same line, about 5 feet north of the south curb line of 23rd street; that the car hit the automobile about in the

center, swung it to the northwest and then hit it again; that plaintiff was thrown out; that the automobile headed for the northwest corner, and the witness jumped, and as he did so it hit the curb on the west side of Western avenue, turned around, recrossed the street and came to a standstill, facing southeast, against the water trough in front of the saloon. John Kasten, who happened to be walking north on the west side of Western avenue about 90 feet south of 23rd street at the time of the accident, testified in part that when he first noticed the automobile it was about even with the west curb line of Western avenue; that it was going east and moving about 7 or 8 miles an hour; that just after he saw it a street car passed him, going north at about 20 or 25 miles per hour; that the car struck the automobile about in its center and knocked it towards the northwest, and then hit it again; that the first collision occurred about in the center of 23rd street and plaintiff was then thrown out, but that "we picked the man up between the two tracks, in the center of Western avenue, and about 20 or 25 feet, I should think, north of 23rd street."

Defendants' version as to how the accident happened, supported by the testimony of several witnesses, is to the effect that when the northbound street car was about in the middle of 23rd street, moving 13 miles an hour or less, the automobile was approaching Western avenue, going east, at a high rate of speed, and that, when the front vestibule of the car had passed the north crosswalk of 23rd street, the automobile, turning towards the north, ran into the west side of the car, bounced back, turned around behind the car and finally ran against the water trough where it stopped. This version is also supported by the condition of the street car after the accident, a photograph of which is in the record, and which photograph, it is stated by several witnesses, correctly represents that condition as

they saw it immediately following the accident. There was a hole broken in the left side back of the vestibule doors, the grab-iron back of said doors was bent, a journal box-cover was off, and there was no apparent damage to the front of the car. The conductor of the car, No. 989, testified that when he took it from the barn, about 3 o'clock in the afternoon, it was then in good condition.

Of course, if defendants' version of the accident is the correct one, plaintiff cannot recover on account of his negligence. And even on his own version plaintiff, in our opinion, was guilty of such contributory negligence as prevents his recovery. He testified that at the speed his automobile was going shortly before the accident he could stop it in about eight feet; that he saw the car approaching; and that he thought he "had ample time to cross". He could have stopped his automobile before getting on the northbound track, but he took his chances and attempted to cross the track right in the pathway of the oncoming car. (Hedmark v. Chicago Railways Co., 192 Ill. App. 584; Hack v. Chicago & Interurban Traction Co., 201 Ill. App. 572; Roberts v. Chicago City Ry. Co., 262 Ill. 228, 231.)

The judgment of the Circuit Court is reversed.

REVERSED WITH FINDING OF FACT.

492 - 24846

FINDING OF FACT.

We find, as an ultimate fact, that plaintiff was guilty of negligence which contributed to his injuries.

507 - 24861

PETER NELSON,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

Appeal from
Circuit Court,
Cook County.

216 I.A. 623

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $2400 in favor of plaintiff in an action for damages for personal injuries.

Plaintiff's declaration consists of three counts. In the first he avers in substance that on June,17, 1913, he was a passenger on one of defendant's street cars, southbound upon Halsted street in Chicago; that he had alighted from the car and had received a transfer entitling him to ride upon another of defendant's cars, westbound upon North avenue; that while he, with due care, etc., was endeavoring to board the North avenue car, and before he was fully and safely on it, the defendant by its servants negligently "suddenly started" the car and thereby "jerked and dragged plaintiff and threw him to the ground," by reason whereof he was severely and permanently injured. In the second count it is averred that the defendant by its servants negligently "suddenly started said car before the plaintiff was fully and safely upon said car", and negligently "dragged plaintiff while he had hold of said car, and was partly upon said car and partly upon the ground." In the third count it is averred that, while the car was moving slowly to the westward and while plaintiff, with due care, etc., and with notice to the servants of defendant, was endeavoring to board the car, the defendant by its servants negligently "drove said car suddenly and violent-

ly forward and * * dragged plaintiff along upon the ground there, while he had hold of said car and while he was partly upon said car and partly upon the ground."

Halsted street is a north and south street and upon it defendant operates cars upon two tracks - northbound cars on the east and southbound cars on the west track. North avenue is an east and west street and intersects Halsted street at right angles. There are also two tracks in North avenue - westbound cars of defendant being operated upon the north track and eastbound cars upon the south track. The street next west of Halsted street is Clybourn avenue. The block between Halsted street and Clybourn avenue is a short one. The occurrence was between 7 and 8 o'clock in the morning. The westbound North avenue car which plaintiff attempted to board was of the pay-as-you-enter type and about 50 feet long. Plaintiff was a cabinet maker, 50 years of age, and was working for an employer, whose place of business was further west on North avenue.

Plaintiff testified in substance that he alighted from the southbound Halsted street car, at a point about 50 feet north of North avenue, went east around the rear of the car, saw the westbound North avenue car standing with its front end about even with the east line of Halsted street, and hurried over to board said car at its rear platform; that a crowd of people were getting on; that he caught hold of the middle bar and stepped up, but "these people didn't move as fast as I had anticipated and when I swung up, * * I touched against these people that were on the step, and the car started at the same time, and it threw me off * * on the street again, but I held on with my right hand;" that he had a lunch box under his

left arm and, dropping that upon the platform, he caught the rear bar so as to balance himself; that then "the car started up still faster, full speed, and it took me off my feet, and it dragged me for several feet and then * * I dropped the hold and struck the pavement with the full length of my body"; that he lost consciousness for a short time, and that then a young man standing on the sidewalk somewhere saw him and came and picked him up. On cross examination plaintiff testified in substance that after he became conscious again he was lying on the street, between the sidewalk and the tracks, "probably three feet west of the west building line of Halsted street"; that he was not on the step of the car from the time the car started until he fell; and that he "ran along with the car", holding on to the bar - the middle handle with his right hand. Plaintiff's only other occurrence witness was William Clettenberg, who testified in substance that he was sweeping off the sidewalk in front of his father's place of business nearly one block west of Halsted street; that he happened to glance up, saw plaintiff holding on to the car and being dragged; that when he first saw him the car was just west of Halsted street; that he saw plaintiff "three or four houses" before he fell off; that after plaintiff fell the witness ran and picked him up; and that when plaintiff was picked up he was about half a block west of Halsted street, which would be "about four houses."

Defendant's version of the occurrence, which is supported by the testimony of the conductor of the westbound North avenue car and of four passengers standing on the rear platform, is, in substance, that after the car had started from the east side of Halsted street, and had crossed Halsted street, and was going at a speed of about 5 miles per hour, plaintiff ran after the car and attempted to board the same, was un-

successful, and fell to the ground, after which the conductor signalled the motorman to stop and the car was stopped within about 20 feet.

At the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, the defendant moved for a directed verdict but the motions were denied. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at $2400. Motions for a new trial and in arrest of judgment were overruled and the judgment appealed from was entered.

We are of the opinion that the verdict is manifestly against the weight of the evidence. And in such case it is the duty of this court to reverse the judgment. (Donelson v. East St. Louis Ry. Co., 235 Ill. 625, 628; Drum v. Capps, 240 Ill. 524, 554; Hawk v. Chicago B. & N. R. Co., 147 Ill. 399, 402; Chicago & E. R. Co. v. Meech, 163 Ill. 305, 308.) And in the present case we think the judgment should be reversed without remanding the cause. "The appellate court may reverse without remanding under two conditions: First, when it finds the facts in controversy different from the finding of the trial court and recites the ultimate facts so found in its judgment; second, when it reverses for errors of law which cannot be obviated or cured on another trial." (Harty Bros. v. Polakow, 237 Ill. 559, 567; Pennington v. Grand Trunk Ry. Co., 277 Ill. 39, 43.) And if, under the different facts as found, no recovery can be had against the defendant, there is no necessity for remanding the cause and this court is under no obligation to do so. (Senger v. Town of Harvard, 147 Ill. 304, 307; Borg v. Chicago, R. I. & P. Ry. Co., 162 Ill. 348, 356.)

In the present case, if defendant's version of the occurrence, supported by the testimony of five witnesses, is

the correct one, then, clearly, defendant was not guilty of any negligence, and plaintiff's injuries were caused by his own negligence. And, if we take plaintiff's version of the occurrence, as disclosed by his testimony, plaintiff was guilty of negligence which contributed to his injuries. When plaintiff, as he says, first attempted to board the standing car at the rear vestibule, stepped up and "touched against" the crowd of people who were also attempting to board the car, and the car started and threw him off on the street again, he still held on to the middle bar with his right hand, and "ran along with the car." When the car was starting and the crowded platform then prevented him from getting on the step or the platform he could have easily let go his hold on the bar and escaped injury, but he took his chances and held on to the bar, doubtless expecting to be able to board the car notwithstanding its increasing speed.

The judgment of the Circuit court is reversed.

REVERSED WITH FINDING OF FACT.

FINDING OF FACT.

We find as an ultimate fact in this case that plaintiff was guilty of negligence which contributed to his injuries.

518 - 24898

BARBARA KUHNE, Appellant, vs. THE SANITARY DISTRICT OF CHICAGO, Appellee.	Appeal from Circuit Court, Cook County.

216 I.A. 624

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County in favor of defendant for costs, etc. The appeal was first perfected in the Supreme Court, but that court decided (Kuhne v. Sanitary District, 285 Ill. 129) that no question of freehold was involved, nor any other question giving that court jurisdiction of the appeal, and the cause was transferred to this Appellate Court.

The action is trespass on the case, commenced May 21, 1915, for damages for injuries to crops, timber and pasturage upon certain lands owned by plaintiff and lying along the Illinois river, in Putnam County. To the original declaration, consisting of four counts, the defendant first filed a general demurrer, and subsequently filed a special demurrer to each of the counts. The court overruled the demurrers as to the first and fourth counts, and sustained them as to the second and third counts. Amended second and third counts were filed by leave of court, and a special demurrer to each was interposed. On November 17, 1917, defendant was given leave to file, and filed, a general demurrer to said second and third amended counts. On November 20, 1917, plaintiff dismissed said first and fourth counts and was given leave to amend the second amended count upon its face, the demurrers therstofore filed to stand thereto, and the court sustained the demurrers to said second and third amended counts,

and, plaintiff electing to stand by the same, the judgment appealed from was entered.

It is first contended by plaintiff's counsel that defendant, by obtaining leave to file and filing a general demurrer to the second and third amended counts, waived the special demurrer theretofore filed to each of said counts. We do not think so. Where a general demurrer to a count of a declaration only is filed, a good ground for special demurrer, such as duplicity or other defect in form, cannot be raised. (1 Chitty Pl. *p. 694; Chicago West Division Ry. Co. v. Ingraham, 131 Ill. 659, 665; Hamilton v. Eisendrath, 185 Ill. App. 502, 507.) But it is common practice to file to a count of a declaration both a general and special demurrer, and we do not think it should make any difference whether a general and special demurrer are filed simultaneously, or at different times, or, if at different times, in what order. Furthermore, before the entry of the judgment, and on the same day, plaintiff obtained leave to amend the second amended count upon its face, the "demurrers heretofore filed to stand thereto." We think that the plural word, "demurrers", referred to the general and special demurrer theretofore filed by defendant to said amended count.

It is secondly contended that the trial court erred in sustaining the demurrers to the second amended count. The substance of that count is that plaintiff is, and for more than five years prior to the beginning of the suit was, the owner and in possession of the lands in question; that the same consist of valuable timber land, farm land and pasture land; that defendant is authorized by the act under which it is organized, to flow through its canal only a certain amount of water into the Illinois river, the amount of said flowage to be based

upon the population of the district and the uniform flow to be increased only as the population of the district increased; that contrary to its legal duty defendant did not maintain a steady uniform flow of water through its canal, during the five years immediately preceding the beginning of the suit, based upon the population, but "at times greatly increased said flow beyond the amount authorized by said statute", and without regard to the population, and "willfully refused to base said flowage upon said population", and that by reason thereof, during said period, great volumes of water "at times" were carried through said canal from Lake Michigan and through intermediate streams into the Illinois river above plaintiff's lands, in such quantities that said lands "at such times" were flooded, and intermittently and temporarily soaked "for a portion of each of the said five years"; that in consequence thereof, much of the timber upon said lands has been damaged and many trees have died, and much of the pasturage has become intermittently and temporarily injured, and plaintiff has lost divers crops and has been prevented from using said lands for farming purposes; and that "the liability of defendant for said act of trespass upon her lands was further imposed by reason of the aforesaid statute under which said defendant was organized" wherein it is provided:

> "361. Liability of Sanitary District for Damages.) #19. Every sanitary district shall be liable for all damages to real estate within or without such district which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet or other improvement under the provisions of this act; and actions to recover such damages may be brought in the county where such real estate is situate, or in the county where such sanitary district is located, at the option of the party claiming to be injured."

Section 20 of the "act to create sanitary districts and to remove obstructions in the Desplaines and Illinois rivers", approved May 29, 1889, in force July 1, 1889, as amended, provides

in part as follows:

> "Any channel or outlet constructed under the provisions of this act which shall cause the discharge of sewage into or through any river or stream of water beyond or without the limits of the district constructing the same shall be of sufficient size and capacity to produce a continuous flow of water of at least two hundred cubic feet per minute for each one thousand of the population of the district drained thereby, and the same shall be kept and maintained of such size and in such condition that the water thereof shall be neither offensive or injurious to the health of any of the people of this State; * * and said district shall, at the time any sewage is turned into or through any such channel or channels, turn into said channel or channels not less than twenty thousand cubic feet of water per minute for every one hundred thousand inhabitants of said district, and shall thereafter maintain the flow of such quantity of water."

In section 23 of said act it is in part provided:

> "If the population of the district draining into such channel shall at any time exceed 1,500,000, such channel shall be made and kept of such size and in such condition that it will produce and maintain at all times a continuous flow of not less than 20,000 cubic feet of water per minute for each 100,000 of the population of such district, at a current of not more than three miles per hour, * * "

In section 25 of said act it is in part provided:

> "Where the united flow of any sanitary districts thus co-operating shall pass into any channel constructed within the limits of the county wherein such districts are located, and which passes into the Desplaines or Illinois rivers, such united flow shall in no case and at no time be less than 20,000 cubic feet of water per minute for each one hundred thousand of the aggregate of the population of the districts co-operating."

It appears from these sections of the statute that defendant is authorized to flow <u>not less than</u> 20,000 cubic feet of water per minute through its main channel for each 100,000 of the population of the district. The inference is, we think, that it may flow more water when necessary to properly dilute the sewage and to render the water not offensive or injurious to the health of any of the people of the state.

The gist of said second amended count is that the

defendant "at times greatly increased said flow beyond the amount authorized by said statute" and "wilfully refused to base said flowage upon said population". In his printed argument here filed counsel for plaintiff contends:

> "If the statute authorizes the recovery of all damages, appellant can certainly recover a portion of the same. She may elect, if she desires, to waive those damages resulting from the steady and authorized flowage of the canal and count upon and recover for solely those damages caused by sudden increases of flowage beyond the amount authorized. This is all that is declared upon in this count."

We are of the opinion that the trial court did not err in sustaining the demurrers to said amended count. We do not think that a cause of action is stated therein. There is no allegation to the effect that when the amount of water flowing exceeded 20,000 cubic feet for each 100,000 of population, that the excess was unnecessary for the proper dilution of the sewage. Furthermore, if plaintiff is seeking to "recover for solely those damages caused by sudden increases of flowage beyond the amount authorized", as suggested by counsel, she has not stated the time or times when said increases occurred, nor the amount of increase, nor the population of the district at such time or times, nor the amount of damage resulting from each increase. As it seems to us, each sudden increase, if any, constitutes a separate and distinct tort and should be stated separately with sufficient particularity as to time, amount of increase, and damaging results, as to advise defendant of the charge or charges it is called upon to meet.

It is thirdly contended that the trial court erred in sustaining the demurrers to the third amended count. The substance of that count is that, during the five years immediately preceding the beginning of the suit, the Chicago river, the artificial channel of the defendant, the Illinois river and Lake

Michigan were navigable and were subject to the jurisdiction and control of the United States government and its war department; that the war department during all of said five years had fixed and restricted the amount of water which defendant might flow from Lake Michigan into said navigable streams, the same not to exceed 250,000 cubic feet per minute; that, in violation of its duty and of the rights of plaintiff and in willful disobedience of said restriction, defendant wrongfully and willfully admitted and caused to flow from Lake Michigan and the Chicago river through its channel into the Illinois river quantities of water greatly in excess of 250,000 cubic feet per minute, thereby causing the Illinois river to overflow its banks and the lands of plaintiff, and resulting in the same damage to her lands, timber, pasturage and crops as mentioned in said second amended count; and that "the liability of the defendant to the plaintiff for said trespass upon her lands was further imposed by virtue of the act under which defendant was organized, wherein it is provided by paragraph 19 thereof as follows"; (Here is set forth section 19 of the statute, as above quoted.)

Defendant in its special demurrer to this count alleges inter alia that the count is double, uncertain and insufficient in that it does not show "whether plaintiff was seeking to recover under the statute as quoted, or under a different liability than that imposed by the statute, or under both the statute and another form of liability, and there is a commingling of causes of action in said count".

We think that the count is double and therefore bad on special demurrer. It states more than one matter as a ground of action. "The object of the science of pleading is the production of a single issue upon the same subject-matter of dispute. The rule relating to duplicity, or doubleness, tends more than any other to the attainment of this object. It

precludes the parties, as well the plaintiff as the defendant, in each of their pleadings, from stating or relying upon more than one matter, constituting a sufficient ground of action, in respect of the same demand, or a sufficient defense to the same claim, or an adequate answer to the preceding pleading of the opponent." (Chitty Pl. Vp. 240.) "Duplicity in a declaration consists in joining, in one and the same count, different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery." (Chicago West Division Ry. Co. v. Ingraham, supra; Henry v. Heidmeier, 236 Ill. 152, 155.) We do not think that the trial court erred in sustaining the special demurrer to the third amended count.

For the reasons indicated the judgment of the Circuit Court is affirmed.

AFFIRMED.

86 - 24944

216 I.A. 624

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

TONY MINGA,
Plaintiff in Error.

Error to Criminal Court, Cook County.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The transcript of the record in this cause contains only a so-called "County Jail Mittimus". From this paper it appears that on December 2, 1918, plaintiff in error was adjudged guilty of contempt of court, and was sentenced to confinement in the county jail for a term of six months, and the jailer was commanded to take the body of plaintiff in error and there confine him for said term. The order of commitment does not set forth the facts, as it should, showing that the court was authorized to make the order. (People v. Hogan, 256 Ill. 496, 499; Rawson v. Rawson, 35 Ill. App. 505, 510.) The judgment is reversed.

REVERSED.

27 - 23999

JAMES HELEGDA,

Defendant in Error,

vs.

MARY HELEGDA, Individually, as Administratrix of the Estate of Joseph Helegda, Deceased and as Administratrix de bonis non with the will annexed, of the Estate of John Helegda, Deceased,

Plaintiff in Error.

216 I.A. 624

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The defendant in error, James Helegda, hereinafter referred to as the complainant, filed this bill making parties defendant his two brothers John and Joseph and Joseph's wife Mary, the plaintiff in error. The bill prayed an accounting and also a partition of certain real estate. By this writ of error, Mary Helegda, the defendant, seeks to reverse a decree by the terms of which a partition was ordered as to one of the pieces of property involved and on an accounting the court found certain sums to be due from her to the complainant and included in the decree provisions requiring her to pay the complainant said sums and establishing equitable liens for said amounts against other property involved to which she held title.

By his bill the complainant alleged that he and his brother John engaged in the saloon business together and entered into a contract in writing defining their res-

pective interests, by the terms of which each of them was to have an equal interest in the business, its earnings and profits, the partnership to continue for a period of five years, from and after the date of the agreement which was March 31, 1905. He further alleges that they purchased at different times four pieces of real estate, which we shall designate as lots 1, 2, 20 and 21, and that certain specific amounts went into the purchase of these lots and in some cases into the erection of improvements thereon, which amounts were the joint earnings of himself and John, taken from the saloon business referred to, and that title to lot 1 was taken in the name of James, to lot 2 in the name of John, to lot 20 in the name of Joseph, (inasmuch as Joseph and his wife Mary were living with James and John, contributing more or less of their labor to the success of the business), and the title to lot 21 was taken in the name of John. The one of the lots upon which improvements were erected was lot 21 and it was here that the parties all lived and conducted the saloon business in question.

The bill contains detailed allegations as to the various interests of the respective parties in the four pieces of real estate which are involved. It further sets forth that contrary to the provisions of the written agreement containing the terms of the partnership of the saloon business which had been executed by the complainant James and the defendant John, said defendant together with Joseph and Mary, put the complainant out of the premises, where they lived and conducted the saloon business, in July 1909 and eliminated him from the partnership and thereafter re-

fused to permit him on the premises or to have anything to do with the business, after which time, said three defendants, conducted the business and enjoyed all the rents, earnings and profits of the premises in question.

The bill prays for an accounting by the defendants, "of the rents, profits and income from said premises" since the time when complainant alleges he was ejected from the premises and eliminated from the partnership, and further; "that the parts or shares justly belonging to your orator and the other owners hereinabove mentioned in and to, the above described real estate may be ascertained, settled and determined, * * * and that a fair division and partition thereof may be made between your orator and the other persons who shall be found to be owners or in any way interested in the same according to their respective rights and interests."

The cause was referred to a Master and while the hearings were in progress and the complainant was putting in his case, John was taken seriously ill and the taking of complainant's proof was suspended and John's testimony was taken. Subsequently John died, on December 26, 1911. Still later, namely, in April 1912 and before complainant had completed his proof and rested his case and before Joseph had testified or had an opportunity to put in any defense, the latter also died.

Before his death John conveyed his interest in the saloon business to Joseph. He left a will leaving all of his property to Joseph and Mary and Joseph became

the executor of his estate. Joseph left two minor children, for whom a guardian ad litem was appointed in these proceedings. His wife Mary was appointed administratrix of his estate and also administratrix de bonis non with the will annexed of the estate of John. Thereupon, by leave of court, the complainant filed his supplemental bill, setting up the matters just referred to and also setting up again the matters contained in the original bill.

By the decree the court found that the facts as to the partnership between the complainant James and the defendant John, and the elimination of James therefrom, were as alleged by the complainant in his bill, and that after James was eliminated from the business, John and Joseph and Mary continued to occupy the premises where the saloon was located and conduct the business until John's death in December, 1911, and that after that, Joseph and Mary occupied said premises and conducted the business until Joseph's death in April 1912, after which Mary occupied the premises and conducted the business.

The court found, for various reasons, which it will not be necessary to discuss here, that the complainant had no title to any part of lots 2, 20 or 21, but that he had an undivided one-half interest in lot 1, and that Mary held the other undivided one-half which, previous to her husband's death, had been held by her and her husband as joint tenants. Therefore the only partition awarded by the decree was a partition of lot 1, according to the reppective interests of the complainant, James, and the

defendant Mary. No complaint was made by either as to this portion of the decree and in this respect, therefore, the decree will be affirmed.

The decree further found that at the time of the purchase of lot 20 title to which was taken in the name of Joseph, he furnished $300.00 towards the purchase and James and John furnished $750.00 out of the earnings of the business, and that when the three brothers erected improvements on this lot, James and John furnished for this purpose the sum of $5300.00, of which $800.00 came from the earnings of the business and $4500.00 was borrowed and to secure the payment of the latter amount, John executed his note and secured it by a trust deed covering lot 21. The court further found that at the time James and John advanced the $750.00 toward the purchase of lot 20, and the $5300.00 for the erecting of improvements thereon, making a total of $6,050.00, Joseph promised to repay the money so advanced but that neither Joseph nor Mary have ever repaid that sum although they have been in possession of the premises continuously and have collected the rents and income therefrom.

The court further found that after James was eliminated from the business and John, Joseph and Mary continued in exclusive possession of the saloon business and the premises (lot 21), they neglected to pay the interest on the $4500.00 incumbrance on that property, above referred to, and in consequence the property was sold under foreclosure and a Master's deed issued to one Laketek, a brother of Mary, whereby the undivided interest to which James was entitled, has been lost to him.

The decree then went on to provide that because Joseph and Mary had failed to pay back any part of the $6050.00, advanced by James to John, for the purchase of lot 20 and the erection of improvements thereon, (in fulfillment of Joseph's promise) and because of the failure of John, Joseph and Mary to pay the interest on the $4500.00 incumbrance on lot 21, as a result of which James lost his undivided one-half interest in that lot, James was entitled to an accounting from Mary as to that $6050.00, and further it was decreed that there was due from Mary to James, on account of the money advanced for the purchase of lot 20 and the improvements thereon, one-half of said sum or $3025.00 together with interest amounting to $1143.25, or a total of $4168.25, and that for the reasons above referred to James was entitled to an equitable lien on said lot 20 for that amount, which lien the decree proceeds to provide for.

On behalf of thedefendant Mary several reasons are urged upon us for the reversal of this portion of the decree but in the view we take of this matter it will be necessary to refer to only one of them. After the deaths of John and of Joseph and after Mary Helegda, as administratrix de bonis non, with the will annexed of the estate of John and as administratrix of the estate of Joseph, had been substituted for the two deceased defendants, a motion was made before the Master to strike out all of the complainants testimony on the ground that under the provisions of sec. 2 of ch. 51 of our statutes it had become incompetent by reason of the deaths of John and Joseph. This motion was denied and in due time there was an objection

by the defendant Mary Helegda to the Master's report on this ground, which objection was overruled and such ruling was duly made the basis of an exception before the chancellor and the overruling ofthat exception has been assigned as error. In our opinion the motion should have been allowed. Smith v. Billings, 177 Ill. 446; Clark v. Harper, 215 Ill. 24. The complainant urges that the decree should not be reversed for this reason because neither the estate of John nor the estate of Joseph are in any way affected by the decree. This we regard as wholly immaterial. The reason why this portion of the decree cannot stand is that the payment of $4168.25 which the decree directs Mary to make to James is specifically, by the terms of the decree, based upon the failure of Joseph to fulfill his promise to repay that amount to James and also upon the failure of both John and Joseph to meet the interest payments on the mortgage on lot 21, as a result of which complainant has been deprived of his interest in that lot. As to the promise to return this money, which the decree finds was specifically made by Joseph, the evidence is in direct conflict. That provision in the decree depends largely, if not entirely, upon the testimony of the complainant James, for its support. It is specifically denied by Mary Helegda, who says that Joseph never made any such promise, but on the contrary she urges that at the time James and John erected the improvements on lot 21, they were without sufficient funds and that she and Joseph loaned them a considerable amount for that purpose, and that later when she and Joseph wanted to erect improvements on their lot, (lot 20), they were without sufficient funds and

therefore urged James and John to pay back the amo nt that had previously been loaned to them by her husband and herself and that James and John did not have the funds with which to pay back the loan and for that reason they put the incumbrance on lot 21 and used the proceeds of the incumbrance to repay the indebtedness to her and her husband Joseph. As to the promise which the complainant alleged Joseph had made to repay the sums referred to, James became an incompetent witness upon Joseph's death and it was error to deny the motion to strike out such testimony as he had given on that subject. Richardson v. Richardson, 148 Ill. 563, 567. Under the statute James was an incompetent witness as to the promise alleged to have been made by Joseph, whether Mary denied it or not. For this reason it becomes necessary to reverse that portion of the decree directing Mary to pay the complainant $4168.25 and providing for an equitable lien in complainant's favor against lot 20 for that amount, and to remand the cause for further proceedings, as to that part of the controversy between the parties.

There was another provision in the decree by which the court found that the complainant was entitled to an accounting from Mary for the use of the saloon premises, (lot 21) and that she should account to the complainant for one-half of the fair rental value of said premises from December 26, 1911, the date of John's death, to May 21, 1912, the date of the Master's deed resulting from the foreclosure on these premises, and that account having been taken and it having been determined that the fair rental value of the premises was $102.00 per month, which would

amount to $510.00 for the period referred to, the decree directed Mary to pay James one-half that amount or $255 and further contained provisions giving the complainant James an equitable lien for that amount against Mary's interest in lot 1. As to this provision the decree will be affirmed. The testimony of James had no effect upon this part of the case and therefore the error committed in denying the motion to strike it out becomes immaterial. We do not understand that there is any denial of the fact that Mary and her husband were in full possession of the premises for the period referred to and that during that period title to an undivided one-half of the premises was in James and the title to the other undivided one-half was in Joseph and Mary as tenants in common. In our opinion there was no error in specifically providing for the equitable lien as to this item. The entering of the decree for this specific sum of money established a lien upon Mary's interest in lot 1, without anything more, and therefore the part of the decree providing for the lien has not affected the defendant one way or the other. As to any other controverted questions of fact that may be said to affect this portion of the decree, we cannot see that there was any error committed by the court in finding as it did, as we are of the opinion that the allegations of the bill are sufficient to support this part of the decree. Casstevens v. Casstevens, 227 Ill. 547.

The contention that there were necessary parties who were not before the court is in our opinion untenable. The amended bill made the trustee, the first and second successors in trust and the owner of the note in connection with

the incumbrance on lot 21, parties, but summons was never issued as to them and they never appeared in the case. These facts were quite immaterial on this record. The amended bill contained such allegations as, if proven, would entitle the complainant to an accounting and as to this issue the parties referred to were quite unnecessary, and there is, therefore, no want of necessary parties as to that feature of the bill. Barr v. Barr, 273 Ill. 621. As to that part of the case having to do with the partition of the interests of the respective parties, the decree entered, affects lot 1 only, as to which the parties referred to, admittedly had no interest whatever. It was therefore unnecessary to have them served with summons and the decree cannot be said to be in any way defective, because they were not brought into the case.

For the reasons stated that part of the decree of the Circuit Court which provides for a partition of lot 1, and also that part directing the defendant to pay the complainant the sum of $255.00, are affirmed, and that part directing the defendant to pay the complainant the sum of $4,168.25, is reversed and the cause is remanded to the Circuit Court for further proceedings not inconsistent herewith.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

209 - 24558

CHARLES M. ROGERS, LOUIS C. ROLLO and CHARLES M. ROGERS, JR., surviving partners of Rogers & Rollo, Appellants,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
vs.	
EDWARD M. FLINT, WILLIAM T. PAYNE and JOHN A. RUSK, Appellees.	216 I.A. 624

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the plaintiffs from a judgment for costs in favor of the defendants.

The defendant Flint was employed by the plaintiff as an insurance solicitor and in connection with that employment he gave the plaintiffs his bond in the sum of $2500, with the defendants Payne and Rusk as sureties. The portion of the bond setting forth the obligation was in the usual form. The condition of the bond was expressed as follows:

> "The condition of this obligation is such, that said Edward M. Flint is about to assume the duties of solicitor in the employ of the firm of Rogers & Rollo and shall well and truly perform the duties of said solicitor and shall truly account for all moneys and other things coming to his hands as solicitor during the term of his employment and at the expiration of the term of employment shall deliver to the said firm of Rogers & Rollo all moneys and other things in his hands belonging to the said firm, then this obligation to be void; otherwise to remain in full force and virtue."

The plaintiff brought this suit against the principal and sureties on this bond, claiming certain breaches of the condition. They filed a declaration containing six counts, to which the defendants filed a general and special demurrer. The court sustained the demurrer to the second, third and sixth counts and overruled the demurrer to the first, fourth and fifth counts. The latter ruling is not involved on this appeal. Further, the trial court allowed the defendant's motion for a bill of particulars as to the latter counts, which the plaintiffs filed within the time specified. After the filing of the bill of particulars, the defendants again demurred generally and especially to the first, fourth and fifth counts "as amended by the bill of particulars" and the trial court sustained said demurrers. The defendants also made a motion to strike the bill of particulars from the files as insufficient, which motion was allowed. The plaintiffs elected to stand by their declaration and bill of particulars as filed and the court entered the judgment above referred to, from which the plaintiffs have perfected this appeal.

We shall consider first the action of the trial court in sustaining the general and special demurrer to the second, third and sixth counts.

The second court set out the bond in <u>haec verba.</u> On the oral argument in this court counsel for defendants contended that the question of the validity of the bond was not involved on this appeal. We are of the opinion that it is. Counsel states in his brief that the court

sustained his demurrer to the second count on the ground that under the condition of the bond there could be no recovery and also because said count alleged, as breaches of the condition of the bond, not only the failure of the defendant Flint to account to the plaintiffs for $2227.54, which it was contended he should have turned over to them on his insurance transactions, which was a matter within the condition of the bond, but also his failure to account for a balance on an old premium account and to pay an alleged balance on an old loan account, which it was held were matters not within the condition of the bond. It seems clear that the old premium account and the old loan account were not covered by the condition of the bond. It cannot be said, as the plaintiffs contend, that these amounts were within the phrase "moneys and other things in his hands belonging to the said firm" which is contained in the condition of the bond. Nor can the allegations as to the old premium account and the old loan account be considered as surplusage as the plaintiffs contend they should be. They are items which from the face of the count are matters for which the defendants cannot be liable under the instrument sued upon and therefore their presence in the count makes it demurrable.

In our opinion the count is not demurrable for the other reason assigned, namely; that under the condition of the bond there could be no recovery, the condition being defective and containing no liability. The condition is not expressed in the usual way, but taking the language exactly as we find it in the bond we are of the opinion that the condition is not defective as contended by the plaintiffs. As was said by

the court in construing a bond containing similar language in Longfellow v. McGregor, 56 Minn. 312, "we are bound to assume that the parties intended the instrument to be effectual, not nugatory. And if what was intended as the condition may be ascertained from the terms, read in connection with the circumstances under which, and the purposes for which as shown by those circumstances, the bond was executed, it must be sustained." To the same effect are the decisions in Hibbard v. McKindley, 28 Ill. 240; Affeld v. People, 12 Ill. App. 502. The case at bar is to be distinguished from Fitzgerald v. Staples, 88 Ill. 234, in which a bond similar in its language to the one involved here, was construed. In the case referred to the condition contained a recital that the obligor had entered into a certain contract with the obligee, by the terms of which, certain things were to be done and concluded by saying "then this obligation shall be void; otherwise to remain in full force." In our opinion the condition in the bond involved in the case at bar contains more than that. It declares that the condition of the bond was such that the obligor is about to enter the employ of the obligee as a solicitor and that he shall well and truly perform the duties of solicitor and that he shall truly account for the moneys and all other things coming to his hands as solictor and that he shall, at the expiration of the term of employment, deliver to the obligee all moneys and other things in his hands belonging to the obligee and concludes by saying, "then this obligation to be void, otherwise to remain in full force and virtue." In the case at bar the condition in the bond contains more

than the mere recital of the terms of the contract involved. It states that the condition of the bond is that the obligor shall do so and so, then the bond to be void; otherwise to remain in full force and virtue. What that language means, in our opinion, is perfectly clear, namely; that the bond is to be void in the event that the obligor does the things that the condition of the bond says he shall do, otherwise the bond is to remain in full force. Again quoting the language of the court in Longfellow v. McGregor, 56 Minn. 312, "To thus ascertain what the parties intended by the instrument executed, is strictly consistent with the rule that a surety is not to be held beyond the contract he has entered into. What contract he has made is to be determined by the same rules of interpretation as are applied to other contracts, the purpose being to ascertain what he has bound himself to. When that is ascertained, his obligation is strictly limited to it." It was not error for the trial court to sustain the demurrer to the second count however, for the reason heretofore set forth.

The demurrer was sustained to the third and sixth counts on the ground that they also declared on items which it appeared, from the face of the counts, were not within the condition of the instrument sued upon. These counts did not set out the bond in haec verba but alleged that on January 2, 1912 the defendants, by their certain writing obligatory, jointly and severally acknowledged themselves to be held and firmly bound unto plaintiffs in the sum of $2500. The counts further set forth the substance of thecondition of the said writing obligatory,

followed by allegations as to certain alleged breaches of the contract. The sixth count alleged a breach involving the old premium account and it was therefore subject to demurrer as was the case with the second count.

We are of the opinion, however, that the third count was not subject to this objection. This count recited the substance of the bond as did the sixth count. It then proceeded to assign as a breach of the contract, that among other things it was the duty of Flint to place all insurance written by him through the plaintiffs' office, which he did not do but on November 30, 1912 he placed certain insurance through the office of W. G. LeMay & Co. And for further breach it alleged that among other things it was the duty of Flint to collect moneys due on insurance premiums and after deducting his commission to account to the plaintiff for the balance due them and that he did "when so employed as solicitor" on January 5, 1912 collect from one Baldwin, $20 of which sum $15 belonged to and was the money of the plaintiff and that Flint did not account to them for said sum or any part thereof. The count alleged another breach in similar language as occurring on May 1, 1912 when he is alleged to have collected $259.10 from N. D. Justi & Son, of which sum $233.19 belonged to the plaintiffs, for which he did not account to them. It is contended that these alleged breaches are not within the condition of the bond and that they are also subject to demurrer, on the ground that they are indefinite and uncertain in that it is not alleged what the specified amounts were for. While the amounts involved are not referred to as premiums on insurance policies, it is alleged that the duties of Flint as a solicitor required him to collect

moneys due on insurance premiums for policies of insurance solicited and written by him and after deducting his commissions, to account to the plaintiffs for the balance due them and that Flint did "in his employment as solicitor" collect the amounts referred to and fail to account to the plaintiffs for the part that belonged to them. That these amounts were for insurance premiums is not open to any doubt from the language of the count. It is also clear that the breaches alleged in the count are within the obligation of the bond.

Turning now to the action of the court as to the first, fourth and fifth counts. It was not in accord with proper practice to demur to those counts "as amended by the bill of particulars", but rather to move to strike the bill of particulars from the files if insufficient. It appears the defendants did this upon the hearing on the ground that the condition of the bond which was set forth in the bill of particulars in haec verba was too vague, indefinite and uncertain upon which to predicate any liability. That motion was allowed and plaintiffs refused to file any further bill of particulars, whereupon the suit was dismissed at plaintiff's costs. While the bill of particulars was not subject to the objection so urged, for the reasons we have heretofore set forth in what we have had to say with reference to the demurrer to the second count, we are of the opinion that it was otherwise defective and that the court was warranted in allowing the motion to strike the bill of particulars from the files. After setting forth the bond in haec verba, the bill of particulars alleged that on December 31, 1912, the defendant Flint signed, executed and delivered to the

plaintiffs a certain writing which was addressed to them and which read as follows: "With regard to the statement of account as shown by the books of your firm submitted to me today, I beg to say that I acknowledge my obligation to you to the extent of $2227.54, for premiums collected by me on business written through your office, for which I have failed to account, copy of which statement I inclose herewith. This amount does not contemplate my entire indebtedness to your firm, there being still due from me to you on old premium account $132.75 and on old loan account $912.64. For this latter item you hold my notes for $500 each." We have already pointed out that such items as Flint may have owed the plaintiffs on the old premium account and the old loan account, which are referred to in their bill of particulars, cannot be considered as within the terms of the instrument sued upon. There is nothing in the bill of particulars to indicate that plaintiffs' suit is confined to the current premium account on which Flint acknowledged his indebtedness to the extent of $2227.54. The first count of the declaration was general in character, reciting that the defendants, by their certain writing obligatory had acknowledged themselves to be jointly and severally bound unto the plaintiffs in the sum of $2500 and although often requested so to do they had not paid the plaintiffs said sum or any part thereof. In the fourth count the plaintiffs after reciting the execution of the bond and the substance of its condition, alleged that Flint failed to account for all moneys coming into his hands as solicitor during the term of his employment, to the extent of $2227.54, where-

fore the plaintiffs had sustained damages to that amount. In the fifth count after alleging the execution of the bond and reciting the substance of its condition, the plaintiffs alleged a breach of said condition in that Flint, at the expiration of his term of employment, failed to deliver the sum of $2360.29, which was in his hands and belonging to them, whereby they were damaged to that amount. The affidavit of claim attached to the amended declaration stated that there was due the plaintiffs from the defendants on account of the bond sued upon, the sum of $3056.09. From the allegations in these three counts and the affidavit of claim attached thereto, together with the bill of particulars, it is impossible to say what items the plaintiffs are suing for and whether or not they are included within the terms of the bond on which their suit is based. Therefore, the trial court properly allowed the motion to strike the bill of particulars.

For the error of the trial court in sustaining the demurrer to the third count of the amended declaration, the judgment is reversed and the cause is remanded to the Circuit Court of Cook County for further proceedings not inconsistent with the views expressed herein.

REVERSED AND REMANDED.

238 - 24589

216 I.A. 624

FRANK S. BETZ COMPANY,
a corporation,

Appellant,

vs.

CHICAGO RAILWAYS COMPANY,
a corporation,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment for the defendants, based upon an instructed verdict. The only error assigned is the denial of the plaintiff's motion for a nonsuit, after the argument on the motion of the defendants for an instructed verdict had been concluded and the jury recalled to the jury box, but before the court had instructed them.

In December 1918 the defendants made a motion in this court to strike the bill of exceptions from the transcript of the record and to affirm the judgment. At the same time the plaintiff made a counter motion, suggesting a diminution of the record and asking leave to file a supplemental transcript of the record. At that time the former motion was denied and the latter was allowed, and the plaintiff filed a supplemental transcript, which contained an order entered in the trial court, apparently in an effort to meet the defect in the transcript of the record as originally filed, which was the basis of the defendant's motion to strike.

Subsequently, on motion of the defendants, the order of the trial court as shown by the supplemental transcript filed by the plaintiff, was set aside and the defendants then made a motion in this court suggesting a diminution of the record and asking leave to file a supplemental transcript showing this last order; this motion was allowed and the supplemental transcript was filed.

After these various steps had been taken, the defendants renewed their motion to strike the bill of exceptions from the record and affirm the judgment, which was reserved to the hearing.

The judgment of the Municipal Court of Chicago, appealed from, was entered March 22, 1918. The plaintiff was allowed sixty days in which to file a bill of exceptions, which time was never extended. The bill of exceptions was not presented to the trial judge within the sixty days. On the reverse side of the last page of the bill of exceptions we find the following: "This bill of exceptions presented this today to me, Acting Chief Justice of this court and dated this 21st day of May, 1918. W. C. Moran, Judge." On May 22, which was one day after the sixty days had expired, the trial judge, who was Judge Wade, entered an order directing "that the bill of exceptions herein presented be and it is hereby approved and ordered filed nunc pro tunc as of the 21st day of May, A. D. 1918."

In the case of The People v. Rosenwald, 266 Ill. 548, the facts involved were almost precisely those of the case at bar and in that case the Supreme court held that the bill of exceptions was subject to a motion to strike, as not

having been properly presented andfiled. The same rule was followed in Gumpert v. Junker & Co., 161 Ill. App. 445, and also in Carter v. Nines, 176 Ill. App. 72.

The order subsequently entered by Judge Olson as shown by the supplemental transcript of the record filed by the plaintiff, merely set forth that according to the records of the Municipal Court, Judge Wade was not sitting in that court on May 21, 1918 and on that date Judge Moran was sitting as an acting judge of the Municipal Court of Chicago. This order of Judge Olson's was subsequently vacated by him on motion of the defendants, over the plaintiff's objection, on the ground that it had been entered without proper notice to the defendants being given. We cannot say that the court erred in vacating the order referred to. In any event, the order vacated was insufficient to save this bill of exceptions, for it did not disclose such a reason forthe failure to present the bill of exceptions to the trial judge within the time allowed, or such necessity for the nunc pro tunc order of May 22 as to bring the case within the provisions of sec. 81 of the Practice Act.

Even with that order in the record there would not be sufficient basis for the nunc pro tunc order by Judge Wade, for there would still be an absence in the record of an affirmative showing of due diligence on the part of the plaintiff, by proper certificate of the trial judge. Newton v. Ohrenstein, 211 Ill. App. 304.

The defendants' motion to strike the bill of exceptions, must be and the same is hereby allowed, and as the only assignment of error filed in this court is

based upon the matters contained in the bill of exceptions and not on any contained in the common law record and the bill of exceptions having been stricken, the judgment of the Municipal Court must be affirmed.

AFFIRMED.

255 - 24606

EDWARD BENDER, by Frank Bender, his father and next friend,

Appellee,

vs.

FRANK KLAJDA, et al,

Appellants.

2101 I.A. 625

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $2,000 recovered by the plaintiff in an action for damages suffered by him in being bitten by a dog alleged to have been owned and kept by the defendants.

The declaration contained four counts, in the first of which plaintiff alleged that the defendants "were the owners, possessed of and maintained a certain dog," which they knew was of a vicious and ferocious disposition. In the second count plaintiff alleges that the defendants were the owners and possessors of the dog "and negligently and carelessly suffered it to be about the premises," and knew that the dog was liable to attack and bite mankind. The third count alleges that the defendants "were the owners and possessed of and maintained a certain dog and permitted the same to be about said premises"; that the dog was of a ferocious disposition, liable to bite mankind, all of which defendant knew, and "that they permitted said dog to become unsecurely fastened to the dog house by reason of which it

became loose and unrestrained and ran at large." The fourth count was to the effect that "the defendants negligently and carelessly permitted the dog to be kept and harbored in said dog house in said yard, which dog was known to be of a ferocious disposition." The defendants pleaded the general issue and they also filed special pleas in which they denied that they owned, possessed or maintained the dog in question and alleged that they did not suffer and permit it to be about their premises.

The defendants contend that the trial court erred in overruling their motions, made at the close of the plaintiff's case and again at the close of all the evidence, by which they asked the court to find them not guilty. In our opinion those motions were properly overruled. The defendants further contend that the evidence is insufficient to show that they owned the dog or kept it as charged in the declaration. We believe it is.

The record contains evidence from which the jury would be justified in believing that the dog in question either belonged to the defendants or had for several days previous to the occasion in question been kept or harbored on their premises with their knowledge and consent, that it was being kept on the premises by them as a watchdog, and that it had a vicious disposition, to the knowledge of the defendants.

The defendant Klajda was a contractor. He and his wife, the other defendant, jointly owned premises containing three buildings, one a flat building, in the first flat and basement of which defendants lived. The plaintiff lived with his parents in the rear on the second

floor of the building. The premises included a yard in which the defendant Klajda kept planks, scaffolding and such material and also a horse and wagon. There was also an automobile kept on the premises, which was used by Klajda and his son in the contracting business. The defendants had had a dog for several years but it had died some time before the occurrence in question. That dog was kept in a dog house owned by Klajda and located in the yard. The defendants had several tenants and their families included a number of children all of whom used the yard as a place in which to play, with the defendant's consent and at their invitation. The dog which bit the plaintiff was a large dog, standing two and a half or three feet high. Plaintiff's father testified that when he got home on the day plaintiff was bitten he asked Mrs. Klajda what had happened and she replied, "Our dog bit him up"; that as he stood on his back porch he heard some of the men tell Philip Klajda, defendant's son, as he came in, "Your dog bit the boy from upstairs"; that Philip then took the dog out of the dog house, where he had been put after biting the plaintiff, and put him in their basement kitchen; that he had seen the dog on the premises three or four days before his boy was bitten, during which time it was kept in defendant's dog house; that he saw Mrs. Klajda and Philip feeding the dog; that when he would pass by the dog house the dog would snap at him and bark and that on one occasion he said to Mrs. Klajda, "You have got a mean dog in the yard this time," to which she replied, "Yes, he will be a good watch dog"; that the dog was first on defendant's premises Monday night (plaintiff was bitten the following Friday) and

that he barked all that night.

The plaintiff's mother testified that she saw the dog in question about the premises four or five days; that as she passed the dog on a number of occasions during that time, the dog would jump up and bark at her; that she remarked to Mrs. Klajda, "You got a mean dog about the yard," to which the latter replied, "Yes, he is a good watch dog, he take the burglars out of the yard"; that the witness said further, "I am afraid to send the children down," to which Mrs. Klajda replied, "He might bite them but he isn't so dangerous"; that this was the third day the dog was in the yard; that she saw Philip Klajda feed the dog once; that the day before the plaintiff was bitten she saw Mrs. Klajda come from her kitchen with a plate of food, and place it beside the dog house and speak to the dog; that upon returning from work on the day plaintiff was bitten and learning what had happened she went to the drug store to which plaintiff had been taken and there met Mrs. Klajda, who said "our dog bit your boy"; that she first saw the dog in question on Tuesday previous to the day the plaintiff was bitten; that the dog was chained to the dog house by a chain a "little thinner" than a lead pencil.

The plaintiff's brother George, eleven years of age, testified that the dog was about the premises four or five days before plaintiff was bitten; that on the day previous he went into the yard and "the dog got on his two hind feet and opened his mouth and growled and barked at me"; that the dog was loose "when he was biting my brother"; that on the day before plaintiff was bitten, Mrs. Klajda came out and said, "keep away from that dog before he bites you";

that the other dog defendants had was killed two or three weeks before plaintiff was bitten.

One Cecelia Rybicki testified that on the day plaintiff was bitten she went to defendant's premises to call on a woman friend who was one of their tenants and that as she went through the rear up the back stairs she saw the dog "lying half in the dog house and showing his teeth * * * the dog showed his teeth and growled."

One Helen Rzepka, who lived in the third flat, testified the dog was on defendant's premises three or four nights before plaintiff was bitten; that "a friend gave the dog to them Monday or Tuesday. We couldn't sleep after that on account of his howling."

For the defense, Mrs. Klajda denied the conversations to which plaintiff's parents had testified. She said that the first time she saw the dog was on the morning of the day plaintiff was bitten; that he was then tied to the dog house; that she did not direct the dog to be tied there; that she never fed the dog.

Frank Klajda, the other defendant, testified that he went to Hammond on Wednesday morning and got back Saturday; that he never saw the dog in question; that there was no dog there when he left on Wednesday; that he never knew the dog was there until he got home; that he did not direct his men to keep the dog for him; that he didn't want a dog around there.

One Odwagny, a laborer employed by Klajda, said he saw one Jablanski, another employee, tie the dog to the

dog house the day before plaintiff was bitten; that he didn't see Klajda either of those two days.

Philip Klajda testified that he had never fed the dog or petted it and the first time he ever saw it was when he got home on Friday afternoon after plaintiff had been bitten.

Jablanski testified he tied the dog up to the dog house about 7 o'clock Thursday morning,- the day before plaintiff was bitten; that he left the premises that morning and returned late Friday afternoon after plaintiff had been bitten.

On this evidence the court properly submitted the case to the jury and they were justified in concluding that the defendants were the owners or keepers of the dog. The evidence was in direct conflict. If that given by plaintiff's witnesses were true, and we cannot say from the record that the jury was not warranted in believing them, he dog was on defendant's premises several days befor the bit plaintiff, with their knowledge and consent and they had him there as a watch dog. The evidence as to Klajda's alleged absence is not wholly satisfactory,- not that it would have been conclusive as to his liability if it had been. The jury might properly have concluded that his testimony was not true. The testimony of his wife and son is strangely silent as to his alleged absence. He himself says at one point in his testimony that he took the train for Hammond from the La Salle station on Saturday morning. It is significant that Mrs. Rzepka, who testified for plaintiff, that the dog was on defendant's premises three or four nights

before plaintiff was bitten and had kept her awake with its barking since the Monday or Tuesday previous, was not on speaking terms with the Benders at that time and she testified that she and Mrs. Bender, at the time of the trial were "not quite good friends" and she said that right after the occurrence in question (on Saturday) defendant Klajda, his son and Mr. Kunz (the alderman of the ward in which they lived) came to see her and she told them the same things she testified to on the witness stand.

As to the dog's vicious character and disposition to bite people, and defendant's knowledge of that fact, if the jury believed Mr. Bender's testimony to the effect that he told Mrs. Klajda they had a mean dog in the yard and that she answered "Yes, he will be a good watch dog", and Mrs. Bender's testimony to the same effect and her further testimony that she told Mrs. Klajda she was afraid to have the children go down in the yard and that Mrs. Klajda replied, "he might bite them, but he isn't so dangerous", and the testimony of George Bender that Mrs. Klajda warned him to "keep away from that dog before he bites you", and the testimony of the several witnesses who said the dog had jumped at them and snapped at them, in our opinion, they were justified in concluding that a case had been made out for the plaintiff on that issue. It was proper for the jury to take into consideration on this issue, such evidence as there was tending to show that the dog was kept by the defendants as a watch dog and usually chained up. C.& A. R. R. Co. v. Kuchkuck, 98 Ill. App. 252; Ciecierski v. Hermanski, 182

Ill. App. 113; Sindak v. Jaskowink, 205 Ill. App. 420; Kahnke v. Friederick, 140 N.Y. 224; Montgomery v. Koester, 35 La.Ann. 1091.

It is contended by the defendants that they cannot be liable for the injuries suffered by the plaintiff even though it be considered that the evidence proves they owned or kept the dog in question and that it had a vicious disposition and was liable to bite mankind and that they knew of this latter fact unless it is further shown that they were negligent in keeping the dog and that by reason of such negligence the dog was at large, and they have called our attention to several authorities to that effect in other jurisdictions. That is not the law in this state. It was held by this court in Ahlstrand v. Bishop. 88 Ill. App. 424, that one who, with knowledge of its dangerous propensities, keeps a dog accustomed to attack or bite mankind, is prima facie liable in an action for damages without proof of negligence or default in the securing or taking care of it, quoting Hammond v. Melton, 42 Ill. App. 186 in which the court said, "the gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensity." The following cases are to the same effect; Flansberg v. Basin, 3 Ill. App. 531; Stumps v. Kelley, 22 Ill. 140; Holt v. Myers, 47 Ind. App. 118; Mayer v. Smith, 52 Ohio State 161.

In support of their contentions defendants have called our attention to the case of Domm v. Hollenbeck, 259 Ill. 382. In our opinion this case rather supports the contentions of the plaintiff in the case at bar. On the

first trial of the case cited, the court directed a verdict for the defendant at the close of the plaintiff's evidence, which defendants contend should have been the action of the trial court in the case at bar. The Appellate court for the Second District reversed the judgment and remanded the case for a new trial in 142 Ill. App. 439, holding that the court had erred in sustaining the objection to the offer of plaintiff to prove that after he had been bitten by defendant's dog, the defendant had stated that he had put the dog in the care of a friend, upon bringing him to town on theoccasion in question, to be tied up and kept in a butcher shop and that he expected that would be done and that the dog would not be permitted to run at large and that his object in doing this was so that the dog would not hurt anybody. It was urged by the defendant that it was not error to reject this testimony as it was not sufficient to show that the dog was liable to attack and bite mankind, nor that the defendant knew the fact and that therefore even if the testimony had been admitted, a case would not have been made out for the plaintiff. The court held that the alleged remarks of the defendant were capable of two constructions, one to the effect that defendant knew the dog would be liable to hurt somebody if he was permitted to run at large and the other that he was ignorant of the character of the dog and that for fear that the dog might have some vicious habits not known to him he caused the dog to be tied up by way of precaution. The court held that the trial court was not at liberty to determine what meaning should be attributed to the language sought to be provenbut that the testimony offered should have been admitted and that the issues should have

been submitted to the jury. On the re-trial of the case there was a verdict and judgment for the plaintiff. The decision of the Appellate Court on appeal from that judgment appears in 175 Ill. App. 62. In affirming the judgment it was held, among other things, that on the evidence which was rejected on the first trial but admitted on the second trial, and the further evidence by witnesses that as they passed the place where the dog was chained up, the dog barked and growled and jumped at them and showed his teeth, and that the witnesses remarked to the defendant that "the dog would bite somebody yet", the court would not be justified in disturbing the verdict of the jury which had been approved by the trial judge. On this second trial of the case the defendant had offered evidence tending to show that the reputation of the dog had been peaceable in the neighborhood where he had been kept, that children were accustomed to play with it without harm and that the witnesses in question did not know of his ever attacking a person. The Appellatecourt did not determine whether the trial court might properly have admitted that testimony but held that under all the evidence, the defendant was not harmed by the exclusion of the testimony referred to. From the judgment of the Appellate court affirming the judgment for the plaintiff in the trial court, the cause was taken to the Supreme Court on a certificate of importance. The Supreme Court reversed the judgment and remanded the cause solely on the ground that the trial court had erred in sustaining objections to the evidence offered by defendant, to which we have referred, saying that such ruling "amounted to holding that while the plaintiff could

prove two instances tending to show a vicious propensity, the defendant could not meet or overcome such evidence by showing that the dog had no such propensity." The court said further that if conclusive proof had been made of the propensity of the dog to attack and bite mankind and knowledge of such propensity on the part of the owner it would have been incompetent to show that at some other time the dog was quiet and did not manifest a bad disposition but that in the case cited the offered evidence was competent and material because the evidence as to the vicious nature of the dog and defendant's knowledge to that effect was not conclusive but was contradicted and denied. It will be seen that the ground upon which the Supreme Court reversed the judgment in that case has no application to the issues presented in the case at bar. On the other issues involved in the case cited, which are similar to those presented here, the Supreme court did not hold contrary to the trial and Appellate courts but in accord with them. The Supreme court said that "the owner of a dog is not liable for damages resulting from the vicious or mischievous acts of the animal unless he had knowledge of his mischievous or vicious propensities and such knowledge must be proven * * *. The proof may be made by evidence of facts and circumstances from which an inference of knowledge arises and it is not necessary that the owner or keeper knew that the dog had committed the same injury * * *. If the owner of a vicious animal knows its character and disposition to commit injury to mankind, he is liable for all injuries he may inflict. (Stumps v. Kelley, 22 Ill. 140; Mareau v. Vanatta, 88 Ill. 132; Keightlinger v. Egan, 65 Ill. 235.)"

Defendants further contend that the plaintiff is precluded from recovering by reason of his contributory negligence in that there is evidence by defendant's witnesses to the effect that the plaintiff was throwing stones at the dog or striking it with a stick and this caused the dog to attack the plaintiff and bite him. This contention cannot be made for two reasons. Counsel for the defendants stated on the trial of the case that no question of contributory negligence was involved,- the case was tried and the jury instructed on that theory. Defendants did not request the court to give any instruction based on such theory. That being the case, defendant cannot inject that contention into the case now. Furthermore, the plaintiff was a child four years of age and is therefore conclusively presumed to be incapable of contributory negligence. Richardson v. Nelson, 221 Ill. 254. Defendant's contention that the point they are urging is not one of contributory negligence but of "invited injury", is untenable.

Defendents contend further that the trial court erred in the matter of certain instructions. It is alleged that the court erred in giving an instruction reading as follows:

> "The jury are further instructed, that, if you find from the preponderance of the evidence, under the court's instructions, that at the time the witness Pietrowski testifies the boy plaintiff made certain statements relative to the occurrence in question, that said boy was under five years of age; that even if you should find the statements attributed to him, by said witness, were made, nevertheless, owing to his youth, said statements of the boy should be received by you with extreme caution."

The druggist Piotrowski testified that while the plaintiff was in the drug store, the doctor asked him, "How did this happen," and that the child said that he had been throwing stones at the dog and hitting him with sticks and the dog jumped on him and threw him down and bit him.

Assuming that the instruction complained of should not have been given, it cannot be considered reversible error for it was more favorable to defendants than to plaintiff for the jury could properly infer from it that they had a right to consider the boy's alleged statements in making up their minds on the issues presented, whereas, for the reasons already stated, the jury should have been told, not that they should consider the child's statements with extreme caution but that they should not consider them at all.

For reasons we have already stated, the instruction in which the jury were tol that plaintiff could not be barred of a right of action by reason of any alleged contributory negligence, in view of his age, of which defendants complain, was a correct statement of the law applicable to this case.

Defendants also complain of an instruction given the jury which reads as follows:

> "The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of his damages. In determining the amount of damages plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration (the) nature and extent of plaintiff's physical injuries, so far as the same are shown by the evidence; his sufferings in body resulting from such physical

> injuries and such further suffering and physical disability, if any, as the jury may believe from the evidence he has sustained or will sustain by reason of such injuries and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the court, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages and injuries are claimed and alleged in the declaration."

It is defendant's contention that this instruction authorized the jury, in estimating the damages to be awarded plaintiff in case they found the issues for him, to include his loss of earning capacity. In our opinion the jury could not reasonably give the instruction such a meaning. Moreover there is no complaint that the judgment is excessive, as there could hardly be in view of the very serious injuries this plaintiff received.

Other errors are urged by defendants with regard to instructions both given, refused and modified. It would serve no purpose to comment on them here in detail. We have carefully considered all of them and are of the opinion that no error was committed by the court as contended.

For the reasons stated the judgment of the Superior court is affirmed.

AFFIRMED.

274 - 24625

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, a corporation,

Appellee,

vs.

W. J. NEWMAN COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 625

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment recovered by the plaintiff for the sum of $556.60.

The plaintiff alleged in its statement of claim that the defendant was the assignee of a certain lease in which the plaintiff was the lessor and that for fifteen months succeeding said assignment the defendant had paid the plaintiff the monthly rental stipulated in the lease, and that on or about October 1, 1912, by agreement of the parties, the lease was cancelled, and it is further alleged that at the time of such cancellation the defendant owed the plaintiff $856.60; being the rental of said premises for the months of May to September inclusive, and that thereafter the defendant had paid $300.00 on account of that indebtedness, leaving a balance due the plaintiff in the sum of $556.60, which the defendant had often promised to pay but had failed to do so.

By its affidavit of merits the defendant alleged that it had never had possession of the premises in question, although it had frequently demanded possession, and that because of its failure to secure the possession, the defendant was compelled to lease other premises at a great loss. The defendant further alleges in its affidavit of merits that on or about October 1, 1912, in order to prevent further loss to the defendant, an agreement was entered into by the parties providing for a cancellation of the lease as of that date, and it is further alleged that at said time the defendant was indebted to the plaintiff for the rent, provided in the said lease, for the months of May to September inclusive and that thereafter the defendant paid the sum of $300 on that indebtedness. The pleadings contained other allegations which are not material to the issues involved.

The trial of this cause came on before the court without a jury on February 5, 1918 and the court postponed the announcement of its decision. On March 5, 1918 the defendant made a motion for leave to file an amended affidavit of merits, which motion the court overruled, and this action of the court is one of the errors assigned. In our opinion the trial court did not err in overruling this motion. The case had been heard by the court a month previous to the making of the motion. The motion was addressed to the sound discretion of the court, and in the absence of a showing on the part of the defendant of some reasonable excuse for not having presented the defense sought to be set up in the amended affidavit of merits before the case was tried, so far as the record shows, we cannot say that

the court committed any abuse of its discretion in overruling the motion." City of Chicago v. Cook, 204 Ill. 373.

On the following day the court found the issues for the plaintiff and assessed its damages at the sum of $556.60. On the hearing of the cause, the plaintiff offered in evidence the defendant's affidavit of merits and there was no evidence offered by the defendant. In our opinion the court was not in error in finding the issues for the plaintiff. Irrespective of the elements of the controversy that existed between the parties over this lease, the statement of claim alleges and the affidavit of merits admits that on October 1, 1912 (two and one-half years before the lease was to expire, under its terms) the parties made a settlement of their differences, whereby the lease was cancelled as of that date, and thedefendant undertook to pay the rent called for by the lease up to that time, and that after that agreement was made it did pay the plaintiff a total of $300, leaving a balance due amounting to $556.60. The cancellation of the lease was a good consideration for defendant's undertaking to pay the rent due at that time, even if the defendant was correct in its contention that it was not liable under the terms of lease.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Transcript

129 - 24435

FRANK T. MEAD,

Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAYS COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY, and SOUTHERN STREET RAILWAYS COMPANY, operating under the name and style of CHICAGO SURFACE LINES,

Defendants in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

216 I.A. 625

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Frank T. Mead brought suit against the defendants street railway companies to recover for personal injuries. There was a verdict and judgment in favor of defendants to reverse which this appeal is prosecuted.

The record discloses that at about one o'clock in the morning of October 5th, 1915, the plaintiff, who was the owner and driver of an automobile, was driving south in Michigan avenue, in Chicago, and when crossing Eighteenth street, the automobile collided with an eastbound street car severely injuring the plaintiff. Mead had been in the cab business for many years and on the morning in question he was at his accustomed stand at the southeast corner of Jackson boulevard and Wabash avenue. He was then engaged to take four passengers to the

South Side where they lived. Three of them sat in the inside of the cab and one in front with the plaintiff. The machine was a right-hand drive, and Mead, therefore, sat on the west side of the cab as he proceeded south.

Plaintiff's theory of the case is that he was driving south at the rate of twelve or fifteen miles per hour; that when he was some distance north of Eighteenth street, which crosses Michigan avenue at right angles, he looked to the southwest to see whether a car was approaching from the west; that there was a building at the northwest corner of Eighteenth street and Michigan avenue with a glass front on both streets; that he looked through these glass fronts and saw the car in question coming east in Eighteenth street; that he then slowed down his machine to about six or eight miles per hour when he was at about the north side of Eighteenth street; that the street car at this time had also slackened its speed, and just before it reached the west side of Michigan avenue was going about six or eight miles per hour; that the plaintiff knew of the ordinance which required street cars to stop before crossing boulevards, and that as Michigan avenue was a boulevard, he knew that the ordinance required the street car to stop on the west side of Michigan avenue before proceeding east; that when he saw the street car slowing down, he thought it was going to stop in compliance with the ordinance; that thereupon he glanced to the east to ascertain whether any street car was coming from that direction, thereby diverting his attention from the car to the west; that he saw no car approaching from the east and assuming that

the car in question would obey the ordinance he increased his speed and as he reached about the north rail of the east bound track he looked to the south and then saw that the car in question had increased its speed and was almost upon him; that he then, in an endeavor to avoid a collision turned his machine to the southeast, but it was too late and the street car struck the automobile between the wheels on the right-hand side and turned it toward the east, almost demolishing the automobile and severely injuring the plaintiff so that an amputation of one of his legs above the knee was necessary.

Defendants' theory of the case is that the street car came to a stop at the west side of Michigan avenue to discharge passengers. And at that time the motorman looked to the north and saw an automobile stopping at the north side of Eighteenth street to permit the street car to pass. At that time the plaintiff's automobile was about one hundred and fifty feet north of Eighteenth street and was coming south at about thirty miles per hour with the cut-out open; that after discharging passengers the street car proceeded eastward and as the front end of the car was a short distance west of the east side of Michigan evenue, the plaintiff's machine smashed into the north side of the front end of the car.

There was evidence introduced tending to support each theory, and as is usual in such cases, the testimony of the witnesses differed as to whether the car stopped on the west side of the street; the rate of speed at which it was going; the exact place where the collision occurred,

and the speed at which the automobile was going, and as to whether the street car ran into the automobile or whether the automobile ran into the street car. In these circumstances it is clear that the case was a proper one to submit to the jury, and, we cannot say that the verdict is against the manifest weight of the evidence as the plaintiff contends.

It is insisted that the court erred in compelling the plaintiff to answer certain questions on cross-examination over objections. The plaintiff was a witness in his own behalf, and on cross-examination in response to a question, he said: "I say the fastest I ever drove the car or ever knowed it to go was twenty-five miles an hour." Q. "You never drove it faster than that?" A. No sir, it wouldn't go faster than that." Q. "The 1909 model Carter car would not go more than twenty-five miles an hour?" A. "That car wouldn't." And then after examining the witness as to the mechanism and operation of the automobile, and whether he could see street cars approaching from the east or the west, and other matters at considerable length, the cross-examination continued: Q. "Did you ever drive your car more than twenty-five miles an hour on Michigan avenue?" A. "I don't believe I ever did, sir." Q. "Were you ever picked up for speeding in that same car on Michigan avenue?" , and after an objection was overruled he answered that he was once or twice. Q. "Didn't they prove in court that you were going as fast as thirty-five miles an hour?", and over objection he answered, A. "I don't know, sir, not to my knowledge

they didn't." Q. "Did you testify in court, or admit in court, that you were going more than twenty-five miles per hour?" Objection was made and the court said, "Inasmuch as he has said that his car has never gone and could not go over twenty-five miles an hour, I will let him answer that question," and the witness said, "I don't know, sir, I don't remember." Q. "Isn't it a fact that in one of your cases Officer Jacobs was the Officer who arrested you for exceeding the speed limit, and in that particular case you admitted in court you were going over twenty-five miles an hour?" Over objection, the witness answered, "No sir." Afterwards the defense produced the police officer who testified, without any objection, that he arrested the plaintiff about two months before the accident for speeding, and that at that time he was going thirty or thirty-two miles per hour. Since the plaintiff first brought into the case the fact that he had never driven his machine faster than twenty-five miles per hour, that it would not go faster than that, and since there was testimony offered on behalf of the defendants that just prior to the collision the plaintiff's machine was traveling at the rate of thirty miles per hour, and since there was no objection to the officer's testimony, viz: that he had arrested the plaintiff for speeding and at that time the plaintiff was traveling at about thirty or thirty-two miles per hour, we are of the opinion that the rulings of the court were not so prejudicial as to warrant a reversal.

Further complaint is that the court improperly sustained objections to the argument of plaintiff's counsel

to the jury, and that the court made improper remarks which prejudiced the plaintiff's case. While the ruling of the court in the first instance was not proper, as the court had a wrong impression as to what the argument was, yet we think the matter was sufficiently corrected when it appeared that the court only sustained the objection to the argument for the reason that he understood it to be that no other witnesses but the motorman had testified for the defendants. This, of course, not being the argument made, we think the jury was not in any way misled or prejudiced against the plaintiff.

The plaintiff further argues that the instructions of the court, were as a whole, highly prejudicial to him; that the court gave twenty-three instructions requested by the defendants, in nine of which the jury was told to find the defendants not guilty and in two others to find for the defendants, and that the jury was also warned not to let the fact that defendants were corporations enter into their deliberations, but that they should consider that the plaintiff was interested in the case, etc. We think it is much more conducive to justice that but a few instructions be given, for in most instances a great many tend only to confuse rather than to assist the jury to arrive at their verdict. The number of instructions, however, cannot be arbitrarily limited, Chicago Union Traction Co. v. Olsen, 211 Ill. 255.

Where an instruction concludes with a direction to find for the defendant, or some similar expression, it is not error to give such instruction if it embraces the theory

of the defendants founded upon the evidence and not covered by any other instruction. In this case we do not think the instructions violate this rule. The plaintiff also complains specifically to the giving of instructions Nos. 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, and 25. The series of instructions given are the same as those given every day in similar cases. It would make this opinion entirely too lengthy to discuss all the objections made in detail, and we will, therefore, confine ourselves to but some of them. We have, however, examined them all carefully and are of the opinion that there is nothing in them that would warrant a reversal of the judgment. Instruction No. 13 was on the quantum of proof required to warrant a verdict for the plaintiff, and was given. A similar instruction was approved in Chicago Union Traction Company v. Mee, 218 Ill. 9. Instruction No. 14, it is said, is wrong because it limits the time within which the motorman should be in the exercise of ordinary care to just before the collision occurred. We think this is untenable. The instruction told the jury that the servants of the defendants were required to exercise ordinary care as the car approached the place of the accident, ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~. We think the plaintiff's interpretation of this instruction is too narrow. It is also said that this instruction ignored the plaintiff's contention that defendants violated the ordinance requiring street cars to stop before crossing boulevards. It was conceded that the car in question was required to stop before crossing Michigan avenue, and we think the jury would understand that if this had not been done the servants of the defendants were not operating

the car as it approached the place of the accident with ordinary care. Instruction No. 15 instructed the jury on the law of the State with reference to the rate of speed, etc. of motor vehicles. The complaint is that it purported to be a copy of sec. 269-j Ch. 121, R. S., when portions of that section were, as a matter of fact, omitted. We think the omitted parts were not pertinent to the issue and were, therefore, properly omitted and the jury were not in any way misled. An instruction in substance the same as No. 15 was approved in Chicago Union Traction Company v. Browdy, 206 Ill. 615. What we have stated in reference to No. 14 is applicable to the complaint made of No. 17. Instruction No. 18 was not improper, Fredericks v. Chicago Railways Company, 208 Ill. App. 172. Instruction No. 19 told the jury that if they believed from the evidence that the street car did not run into the automobile, but that the automobile ran against the side of the street car, the plaintiff could not recover. The theory of plaintiff's case was that the street car ran against the side of the automobile, and this being true, he could not recover unless the jury so found. It was not error to give instruction No. 20, Flynn v. Chicago City Railway Co., 250 Ill. 460, and the same is true of No. 21, Schumann v. Chicago Railways Co., 198 Ill. App. 447. Instruction No. 23 told the jury that if they believed the sole cause of the accident was occasioned by the manner in which the automobile was being driven, the plaintiff could not recover. We think this was not improper, nor was it prejudicial error to give instruction No. 25, Pienta v. Chicago City Railway Co. 284 Ill. 246.

Photographs of the street car showing its damaged condition after the accident are in the record, which strongly indicate that the automobile ran into the street car as defendants contended, and since the jury apparently found that this was the fact, we do not believe there is any error in the record to warrant a reversal of the judgment. The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

217 - 24566

MILDRED M. SCHWENGEL, Administratrix of the Estate of Rudolph Louis Schwengel, Deceased,

Appellant,

vs.

MORRIS HIRSCH,

Appellee.

21 C.A. 625

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mildred M. Schwengel, as administratrix of the Estate of Rudolph Louis Schwengel, deceased, brought suit in the Superior Court of Cook County against Swift & Company and Morris Hirsch to recover damages for the death of Rudolph Louis Schwengel, alleged to have been caused by the wrongful acts of the defendants. The suit was afterwards dismissed as to Swift & Company, and the case went to trial against the defendant, Morris Hirsch, alone. At the close of the plaintiff's evidence there was a directed verdict in favor of the defendant.

The record discloses that a horse, which was hitched to a grocery wagon belonging to the defendant, ran away and that the deceased ran out into the street to stop the horse; that as he did so the horse shied away from him and the wagon swung around or swayed and to avoid being struck by it the deceased stepped back and was struck by an automobile truck belonging to Swift & Company, coming in the opposite direction and was killed.

Plaintiff's theory is that the deceased was not guilty of contributory negligence for the reason that the deceased, at the time he received the fatal injuries was endeavoring to save a boy who was in the grocery wagon from personal injury or death. There is no dispute that if there was evidence to sutain this theory, there would be liability. Devine v. Pfaelzer, 277 Ill. 255. But the defendant argues that there is no evidence that the deceased had any such intention.

We regret to say that this case was very badly tried. The evidence does not clearly disclose just where or how the accident occurred. It does not clearly appear whether the horse was going north or south in State street, nor in what part of the street the accident took place. The witnesses were not at all closely examined so that the situation could be made clear to the jury, but we gather from an examination of the entire record that the horse was running away going at a fairly fast trot south in State street east of the east car track; (although council for plaintiff says "the witnesses saw the horse running away, going north on State street near 57th street" and again "the horse was traveling north near the northbound street car tracks of State street"); that the deceased was on the east side of the street, and as he looked north he saw the horse running away coming towards him to the south; that deceased then ran out into the street, raised his hands and endeavored to stop the horse; that the horse shied to the west and the wagon swayed or swerved; that deceased then stepped back to the east a step or two in front of the auto truck coming north on the east side of State street, and was run over

and killed. The evidence further discloses that the wagon was a closed grocery wagon, open only in the front and rear. The witness, Hanley sitting at the window in his home opposite where the accident occurred, testified that he saw the wagon coming down the street without a driver in it; that there was a small boy about twelve or fourteen years old trying to get in the back of the wagon over the tailboard, and that the boy was not in the wagon at the time the accident happened. There was a statement of Josephine Jackson in the record and it was admitted that if she were present she would testify that she saw a horse running away in State street, that the horse was on the east side of State street near the east walk, and that "there was a little boy on the wagon", and that she saw the deceased leave the sidewalk in front of the livery stable and try to stop the horse which was coming towards the deceased; that she also saw a truck belonging to Swift & Company coming from the south and going north. There was also a statement of Martha Thomas, and also an admission that if present she would testify that she was standing at the southeast corner of 57th Place and State street when she saw a runaway horse coming south on the northbound street car track; that she saw the deceased near the cross-walk of 57th Place endeavoring to grab the bridle of the horse; that the deceased stepped back towards the curb about two paces to avoid the wagon and was struck by the auto truck which was going north between the east roadway and the street car tracks, and that "there was a little boy on the wagon". Other witnesses testify they saw a boy on the wagon, but none of them testified as to when or how they saw him on the wagon

or where the boy was, but if there was a boy on the wagon, which we must assume, the witnesses saw him after the wagon had passed them to the south by looking in the rear end of the wagon which was open.

Considering all the evidence, we think there is none that tends to show that the deceased knew the boy was in the wagon and went to stop the horse to prevent the boy from being injured or killed, and in these circumstances, of course, the verdict was properly directed. The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

226 - 24576

CITY OF CHICAGO,
Appellee,

vs.

PETER THEOLOGES,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

216 I.A. 626

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendant was charged in the Municipal Court of Chicago with the violation of a section known as 2025 of the Revised Municipal Code of Chicago. A jury was waived and the cause submitted to the court. The defendant was found guilty and fined $100.00 and costs, to reverse which he prosecutes this writ of error.

The only point he has made is that sec. 2025 of the Revised Municipal Code, and for a violation of which the defendant was found guilty, had prior to the violation claimed, been repealed, and therefore, there was nothing upon which the charge could be based. It is argued that since the Municipal Court is authorized and required to take judicial notice of all general ordinances of the city, that this court should also take such notice. There is no ordinance in the record, and it has been repeatedly held that this court does not take judicial notice of the ordinances of the City of Chicago, but that they must be incorporated into the record. City of Chicago v. Tierney, 187 Ill. App. 441,

City of Chicago v. Moran, 192 Ill. App. 57; City of Chicago v. Kohn, 195 Ill. App. 399.

There being no ordinance in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

283 - 24634

FORSTER, WATERBURY & COMPANY,

Appellant,

vs.

JAMES F. BISHOP, as Administrator of the Estate of George F. Ryan, deceased, substituted as defendant instead of George F. Ryan, trading as George F. Ryan & Co.,

Appellee.

216 I.A. 626

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 25, 1907, the plaintiff brought suit upon the common counts for the sum of $8,000.00, and on February 2, 1909, defendant filed a plea of the general issue. On February 9, 1909, the plaintiff was ordered to exhibit to the defendant its books of account, and on February 15, 1909, a further order was issued upon the plaintiff to produce for examination and inspection certain books and memoranda.

The record shows that nothing further was done in the cause until June 15, 1917, over eight years afterwards, when Herbert Bebb was given leave to enter his appearance as attorney for the plaintiff and a certain order striking the cause from the docket was set aside and vacated, and the cause redocketed and reinstated and the death of the defendant suggested, and the present defendant substituted.

On October 27, 1917, the defendant filed a further plea, setting up that the several supposed causes of action in the declaration did not accrue within one year after June 29, 1915, when letters of administration were issued to the defendant; that all of the assets of the estate of Ryan, deceased, were inventoried in the Probate Court in the one year prior to the time the defendant was substituted as defendant in this cause, and that there are no assets of the said estate out of which any judgment against the defendant, as administrator, can be satisfied.

The deceased, George F. Ryan, in his life time, bought, from time to time, on account, certain merchandise from the plaintiff. According to a statement of account, which was offered in evidence, he transacted business with the plaintiff between 1901 and 1908 to the extent of about $12,000.00. The plaintiff, claiming that the defendant was its debtor, began two suits against him, one of which is the cause here involved. On December 21, 1910, in the other suit, judgment was entered against him in favor of the plaintiff in the sum of $3,382.00 and costs. The controversy between the defendant and the plaintiff, in the instant case, is what amount, if any, is due the plaintiff on an alleged open account. It is claimed by the plaintiff (and testified to by the witness Patterson) that in the Fall of 1910 Patterson, acting as attorney for Ryan, entered into negotiations with the plaintiff in order to bring about a settlement of the whole of its account with Ryan; that he presented an itemized state-

the

ment of the account to Ryan and Ryan examined it, item by item, and said it was correct; that Ryan told him, Patterson, to go ahead and deal with Forster (of the plaintiff company) in any way he wished; that accordingly, in December, 1910, Patterson acting as attorney for Ryan, consented that judgment be entered upon certain notes (part of Ryan's alleged indebtedness) in favor of the plaintiff and against Ryan, in the sum of $3382.00 and costs; that, later, Ryan became insane, and his wife, Mary Alice Ryan, became his conservatrix; that while acting as such, and upon the advice and direction of Patterson, and in consideration of the release of the judgment of $3382.00, she transferred to one Forster the six shares of stock in the Fruin Walker Co., which had belonged to Ryan; that subsequently, through the Probate Court, Ryan was restored to reason, and, thereafter, in that court approved the account and the transfer of the stock; that Ryan then stated that his total indebtedness, to the plaintiff, including the judgment (which had been released) for $3382.00, was $8060.21.

In October or November, 1911, the firm, of which Patterson was a member, filed a bill in chancery on behalf of Forster for an accounting of the affairs of the Fruin Walker Co. with a special reference to the dividends due on the six shares of stock which Ryan had formerly owned. Patterson testified that objections were filed in the Probate Court to the transfer of the six shares of the stock from the conservatrix to Forster; that they were overruled and that, when Forster applied to the Fruin Walker Co. for a transfer of the stock, the

latter company announced that objections were pending leaving a doubt as to the title to the stock and so refused to make the transfer until that matter was cleared up. Apparently, the only estate Ryan had, consisted of the six shares of stock of the Fruin Walker Co. Patterson further testified for the plaintiff that the reason for not consenting to the entry of judgment in the instant case was the fact that the answer of the garnishee, the Fruin Walker Co., as to the amount due, was contested, and it was decided to keep the suit pending in order to require the garnishee to further answer as to the accumulation of dividends. Also, he testified that, at the time of the final accounting in the Probate Co rt, Ryan was present and read the statement of account through and said, "That is all right, that is what I want". "Now go ahead and go after those fellows,"(referring to the Fruin Walker Co.) "Get all you can out of them."

The widow of Ryan corroborated Patterson as to the account with the plaintiff. She testified that her husband said he owed them that money and that he wanted it paid; that when the statement was brought to them they looked it over and talked over the different items; that he said it was just and that the amount was all right; that he said he owed the money; that subsequently, also, after he was declared sane, he said he owed the money and wanted to pay it if he could. Mrs. Ryan in her testimony admitted that, during the time she was conservatrix of her husband, she transferred the six shares of stock, in the Fruin Walker Co., to Forster; that it was transferred to Forster to pay a judgment;

that it was understood she was to get whatever dividends had accrued on the six shares of stock prior to the time of the transfer to Forster. On the other hand the testimony of Williams, an attorney, called by the defendant, is to the effect that on December 23, 1912, he had a conversation with Ryan at his house; that Ryan stated "that he didn't owe Forster Waterbury & Co. anything and that this was some of Forster's smooth financing;" that in that conversation they talked about two suits, one upon an open account. The witness Williams was at that time the attorney for the Fruin Walker Co., and was engaged in taking the deposition of Ryan to be used in the chancery suit which had been begun against the Fruin Walker Co.

There was offered in evidence a letter dated July 10, 1911, written by Forster to Patterson, and which is endorsed at the bottom, "Accepted July 10, 1911, F. S. Patterson." In that letter Forster states that he is the owner of six shares of stock in the Fruin Walker Co. and entitled to the dividends thereon from July 1, 1907, subject to $8061.00 due to attaching creditors, which amount he intends to pay from what he receives as dividends on the six shares of stock. The letter, further, states that out of what he receives as dividends he will pay Patterson and the Ryan Estate $6,000.00; that his estimate of the earnings due on the six shares since July 1, 1907, is $15,000.00. He therein further proposed to Patterson that he act as his, Forster's, attorney and take proper proceedings; and as compensation he should receive, out of the proceeds, $6,000.00.

On January 22, 1918, the cause was tried before a jury and the issues found for the defendant; and on

February 9, 1918, judgment was entered that the plaintiff take nothing by its suit and that the defendant recover costs.

Reduced to its simplest terms, the substantial question before the jury was whether Patterson and Mrs. Ryan, on the one hand or Williams on the other, should be believed. Of course, from the verdict it is quite obvious that the jury did not believe that Ryan in his life time admitted the indebtedness. Counsel for the plaintiff claimed that Ryan admitted the correctness of the account upon which the demand was based; that there was no evidence of fraud or mistake in the circumstances under which he admitted the correctness of the account; and that the admission became conclusive evidence of his indebtedness. On the other hand, counsel for the defendant claimed that the evidence shows that the only asset of the Ryan Estate was the six shares of stock in the Fruin Walker Co.; that the transfer of that stock by the conservatrix to Forster was a collusive arrangement; that as the result of that arrangement both Patterson and Mrs. Ryan were to receive compensation from Forster if he was successful in his accounting with the Fruin Walker Co.; that Ryan in his affidavit to his plea denied any liability; that the testimony of Williams - that Ryan, after he had been restored to sanity, as late as December 23, 1912, in the presence of both Patterson and himself, said that he did not owe anything to the plaintiff - was not denied by Patterson, and that, therefore, the jury was justified in its verdict.

Under the circumstances, the conflict is such

that we do not feel justified in overriding the verdict of the jury. It is not a case where there are three witnesses, all seemingly of equal credibility, two of them testifying for the plaintiff and one for the defendant, and no other evidence. There are, present, a number of circumstances, outside of the testimony of the three witnesses, which the jury was entitled to consider; such, for example, as the affidavit of Ryan to the plea which he filed on February 2, 1909 and which ante-dated the time when it is claimed he admitted the indebtedness, and which affidavit is consistent with William's testimony; also, the fact that both Patterson and the widow were to profit by the transfer of the six shares of stock and the entry of judgment in this cause.

After a careful analysis of all the evidence, we are of the opinion that the judgment is not manifestly against the weight of the evidence.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

MR. PRESIDING JUSTICE THOMSON SPECIALLY CONCURRING:

I concur in the decision of this case as announced in the foregoing opinion, but on thegrounds that there is no competent evidence in the record supporting the plaintiff's case, as both its witnesses were incompetent as contended on the trial by the defendant.

304 - 24655

EARL G. ANGLIN, a minor by THOMAS J. ANGLIN, his next friend,

Appellee,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corp.,

Appellant.

216 I.A. 626

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, a minor, by his next friend, brought suit against the defendant for personal injuries and recovered judgment in the sum of $7500.00 and costs.

The material facts in the case are substantially as follows: The plaintiff at the time of the injury, on February 18, 1916, was ten years and eleven months of age and was injured while undertaking to cross the railroad tracks of the defendant in the Village of Maywood, Cook County, Illinois. The intersection where the injury took place was made by a north and south highway known as 17th avenue crossing the tracks of the defendant railroad. The south track was known as the eastbound main and the track just north of that, and parallel with it, the westbound main, just north of the latter were two other tracks, used for switching purposes, making in all four tracks crossing 17th avenue. Crossing the tracks from north to south, in the center of 17th avenue, there was a plank roadway about 15 feet wide, and crossing the tracks on the east side of

17th avenue, there was a plank walk. 17th avenue is 66 feet wide and there were 18 feet between the west side of the east sidewalk and the east side of the plank roadway. Two blocks north of the railroad there was a public school which let out, daily, about 3:30 P.M. On the day in question, when school let out in the afternoon, the plaintiff and a number of other children, who lived south of the railroad, proceeded south from the school on the east side of 17th avenue to the railroad. When they arrived at the railroad it was seen that there was a freight or switch train, with the engine at the west end, blocking the crossing. It moved backwards and forwards over the crossing from five to ten minutes after the children arrived. There were from eight to twelve children waiting to cross the tracks; some of them were waiting at the east sidewalk and some scattered across the street. A switchman, Blake, of the freight crew, was on the ground, a short distance east of the crossing and on the north side of the freight, and from time to time he gave signals to the engineer to move the train either forward or backward. Finally, the freight train was moved eastward until the front of the engine was upon the east side of and had nearly cleared the crossing, and the switchman on the ground, by some signal, either by his hands or word of mouth, (this, however, is disputed) directed or suggested to the children to cross the tracks. The defendant claims that whatever signal was given was for the engineer. Thereupon, some of the children, started to cross the tracks just west of the west end of the switch engine. The plaintiff and another boy were in the lead and were closely followed by some others. The other boy, Rodman, was slightly in advance of the plaintiff, and just after they had crossed in front of the switch engine

and taken a few steps beyond, a milk train, known as No. 31, going west at a speed of twenty-five to thirty miles an hour, struck both boys. Rodman was killed and the plaintiff, seriously injured.

The north switch track, upon which the freight had been switching from a point a short distance east of 17th avenue, curved somewhat as it ran easterly. The conductor of the freight at the time of the accident was 15 cars east of the freight engine. The conductor gave signals to Blake, the brakeman, in order that Blake might pass them to the engineer, who, on account of the curve, could not see the conductor. At that time Blake was about four car lengths east of the crossing. When Blake received signals from the conductor he relayed them to the engineer. The rear end of No. 31, after it had stopped, was about 500 feet west of the west line of 17th avenue.

The fifteen year old witness, Azamar, who was one of the school children, testified that the plaintiff and Noel Rodman went west, a little, to the center of the road in order to go around the engine; that when they started across the tracks they were going a little faster than a walk. He further testified that about five minutes after he got up to the train "the train started to back up and it got to where the sidewalk was and we had to walk out two or three feet towards the center of the road to get around it and we stood there and the train man down east of the road waived his hand and said something, but I did not understand what he said because I could not hear very distinctly, the engine was making so much noise then"; that when the engine backed up and stood still he waived his hands and "I saw him open his mouth but I did not under-

stand anything. I could not hear him distinctly, then we started walking around the front and the train came past, then struck them". When asked if he looked down east he answered, "I looked down there but you could not see anything"; further, that the switch engine had about ten cars; that there were other cars on switch tracks to the east that prevented you from seeing the track that No. 31 came on. His testimony intimated that he looked several times towards the east but did not see train No. 31 coming.

The witness Weist, a school teacher, testified that she was there waiting for an Aurora Elgin train; that she did not notice the switchman; that she was talking to the children; that they were all in a hurry to get across; that she did not notice the No. 31 train until she saw it fly by; that she heard no bell or warning; that she stood about ten feet from the freight train with the children; that she saw some man standing south of the street but did not notice what he was doing; that she did not see any signal given by him to the children.

The witness, Dorothy Dutton, thirteen years old, testified that she waited five or ten minutes with seven or eight others, boys and girls, waiting while the train was switching about; that there was a man between them and the shanty which was south of the road; that he was signaling the engineer. As to what the man did she testified; "Well we were all standing there. I didn't see anything happen before the man told us to go across". "We were just standing there when the man told us to cross" and "he motioned from the south to the north and told us to go across." "He said go across." "I don't know whether those were the exact words or not but it was similar, that

is what he meant." Further, that after the man told them to cross they all started; that she saw the plaintiff and the other boy start and she started herself; that she did not see the train hit the boys; that she did not hear the passenger train or hear any bell; that the boys were about the middle of the plank roadway when they started to cross.

The witness, Rose Rengeau, fifteen years old, testified that the freight blocked the crossing about ten minutes and she saw the plaintiff and Noel Rodman; that they were standing waiting for the train which was over the sidewalk; that the man said "go on across"; that they went, the crowd of them, to go across; that they could not see the train was coming on the other side "on account of the freight train, that was so long. There was a switching yard there;" that the plaintiff crossed over the middle part of the street and she did not see the boys when they were struck, "it happened so sudden it was impossible"; that there was no switchman there and there were no gates there. On cross examination she stated that she did not hear what the man said but saw the motioning and saw the motion of his lips; that she did not see the other train coming; that she could not see it because of the engine and the freight cars; that she stopped because a girl called to her; that she stopped on the track in front of the freight engine; that the freight engine was making so much noise "you couldn't hear anything"; "it came up (meaning No. 31) so swift that you could not see it"; that the boys did not run right in front of the switch engine and right into the other train; that the children were together; the two boys first by about a foot or so and the girls in the back; that she thinks the plaintiff went right straight across and was hit by the other train; that she did not see the other

train coming. "I could not see it." "We could not see the train because the engine was so long and because the freight cars were so long"; that when she passed the freight engine it came like a flash; that she did not get ahead because a girl called to her.

The plaintiff testified that at the time of the accident he was in the fourth grade of school; that on the day in question he and Noel Rodman started home from school; that they were going to the ice pond; that the train that blocked them was going back and forth east and west; that he remained there from about five to ten minutes; that the switchman that was between him and the center said to them, "go ahead across"; that at the time the cow-catcher of the engine was about the middle of the road; that he and Noel Rodman, who was a boy eight or nine years of age, who was ahead of him, then went around the cow-catcher; that he did not hear any warning of any kind; that he did not know that the passenger train was coming; that "the exhaust steam from the freight engine drowned every sound, you can not hear nothing"; that all he recollects was that something hit him; that he knew nothing after that. On cross examination he stated that he lived near the tracks and knew the switch yards; that he knew that trains went back and forth over the crossing and the switches; that he was always careful when he went to a crossing and looked every way; that at the time he was crossing he was going between a trot and a walk; that he did not stop in the middle of the track on which the freight engine was; that before he started to cross the track he looked both ways and then while crossing the track he did not stop; that the train either ran into him or he ran into

the train; that he did not know which.

The witness, George Haag, for the defendant, testified that he was the engineer on the freight or switch train; that when he stopped his train the cabin of the engine was about the center of the crossing; that Blake, a brakeman, who was about five car lengths east of 17th avenue, on the north side of the track, had been giving him signals while he was backing up; that he noticed the children on the street but did not see any of them try to pass his train; that just before No. 31 passed steam was escaping from the safety valve of his engine; that it was making no unusual noise; that he did not hear Blake make any statement to the children; that there was a curve in the track and the train east of Blake; that Blake had been getting signals from others; that he could not see on account of the curve and was relaying them to him; that Blake was transferring signals from the rear end to the head. On cross examination he stated that there were about a dozen children collected around the crossing; that when his engine stopped its front end was just over the east sidewalk at 17th avenue; that it blocked the sidewalk; that the children were on the sidewalk and in the road both.

The witness Thurtle testified that he was the conductor on the freight train and at the time of the accident was fifteen cars east of the freight engine east of the crossing; that there was a curve in the train; that he had a brakeman, Blake, giving signals to the engineer; that he had been switching, making up his train, for five or six minutes; that he heard the whistle of No. 31 and saw the children running; that Blake was between him and the engineer. He says he did not hear him tell the children to go

across. On cross examination he stated that he could not have heard him had he done so.

Percy Blake, for the defendant, testified that he was brakeman on the switch engine at the time of the accident and just prior to the time that No. 31 went by he was about 100 feet east of the crossing and had been there about five minutes giving signals, which he received from the conductor at the rear end of the train, to the engineer; that there was a curve in the train; that he saw children on the crossing; that just before No. 31 arrived the, were backing up and he was giving a back up signal; that he did not at any time tell the children to cross or give them any instruction of that kind; that he did not speak to the children; that he gave no signals to the children. When asked if he knew that No. 31 was coming he answered; "I did not know for sure." Further, that he saw "a bunch of boys standing in the crossing"; that he has no recollection of the two; that it was no part of his duty as a switchman to signal people to cross over the crossing; that he never did. On cross examination, however, he stated that there was no flagman at the crossing; that it was the duty of the trainman to see that a switch train does not block a crossing too long where there is no flagman; that sometimes he did tell people to cross; that the freight train at the time had about 12 or 15 cars; that he knew No. 31 was coming along some time but he did not hear it coming until it flashed by him; that he knew at the time No. 31 was due; that he did not see train No. 31 until it was stopped.

Graves, engineer of No. 31, testified that he whistled about 80 rods before reaching the crossing and the bell rang automatically; that the train struck two boys;

that the crossing was blocked; that the boys must have gone around the switch engine in front of the train; that No. 31 was going 25 miles an hour; that he said at the inquest 30 miles.

Benson, who, at the time was sitting in his express wagon near the crossing, testified that he had to stop on account of the crossing being blocked; that he was blocked probably five minutes; that, when No. 31 passed, the switch engine was partly on the crossing; that he was driving north on 17th avenue and stopped on the south side between the Aurora tracks and those of the defendant; that he was only fifteen or twenty feet from the defendant's tracks; that he saw No. 31 coming and then looked under the freight cars and saw two boys going west; that he thought they were going around the engine to get across; that he saw them a little west of the engine; that the switch engine was moving east; that when the boys were struck they were west of 17th avenue about 20 feet or more; that he did not hear No. 31 whistle, but he saw it coming; that as he saw the boys feet under the cars they were trotting. On cross examination, he stated that he might have been standing there for more than ten minutes; that he meant that the boys crossed 30 feet west of the planks on the crossing; that there were two other boys that crossed over before the plaintiff and Rodman.

There was offered in evidence an ordinance of the Village of Maywood which provided that, "it shall not be lawful for any railway company * * * to run any * * * train * * * within the corporate limits * * * at a greater rate of speed than twenty miles an hour." Also, attention was called to Sec. 87, Chap. 114, Rev. Stat. 1908, Hurd 1677, which pro-

vides that, "Whenever any railroad corporation shall * * * run any train * * * at a greater rate of speed in and through * * * any city, town or village than is permitted by any ordinance of such city, town or village, such corporation shall be liable * * * and the same shall be presumed to have been done by the negligence of said corporation", etc.

The history of the plaintiff's injuries is as follows: A compound, comminuted fracture of the right thigh, both bones penetrating the skin behind the thigh; dislocation and bruising of the right knee; a bruise on the left buttock; right side severely bruised; right collar bone dislocated from breast bone; severe contusions of chest wall; a scalp wound and severe contusion of the left kidney. The leg became infected and was dressed daily for a year, and discharged for about that length of time. The plaintiff was in bed for about 8 months. His leg was in an ambulatory splint for about a year, the splint enabling him to walk around without using the bones of the leg. To stimulate bony union the leg was exercised and massaged. After about a year the ambulatory splint was removed and a free splint applied. About a year after the injury, and just after the ambulatory splint was taken off, the plaintiff undertook to walk on crutches and while being instructed by his father how to use them in going up stairs, when nearly at the top, he made a misstep and fell, fainting and breaking his leg in the same place as before.

When the ambulatory splint was taken off and the plaintiff undertook to walk on crutches, as a result of the doctor's advice, and after the leg was broken the second

time, the doctor put him under an anaesthetic, straightened the leg and reapplied the ambulatory splint. It was kept on until within three or four months of the time of the trial. At that time the evidence shows the bones at the point of fracture at an angle of 15 degrees, and that there existed a large mass of fibrous tissue and about two inches of thickening. It was the opinion of Dr. Roberts, his physician at the time of the trial, that the ossification was not yet complete; also, that the bone would bend further if he did not use a crutch, and that the proper prodecure now would be an open operation; to open down to the bone, chisel away callous and old fibrous tissue and put in sliding bone graft. Further, it was his opinion that the strength of the leg is now about one quarter of that which is natural and normal. The plaintiff testified that he now uses two crutches and can not get along with one without suffering.

The cause was tried before a jury and a verdict in the sum of $7500.00 was recovered. Judgment was entered thereon, and this appeal taken.

Not as much care is required of a boy of eleven as of a man of mature years. A minor is charged with the exercise of such care xxxxxxxxxxxxx as, reasonably considered, he should use, having in mind both his age and his mental and physical capacity, and the circumstances of the case. Heimann v. Kimmare, 190 Ill. 156; C.R.I. & P. R. Co. v. Eininger, 114 Ill. 79; C. C. Ry. Co. v. Wilcox, 138 Ill. 382.

When the plaintiff and the other children started to cross, after the freight train had backed to the east side

of the crossing, they could not see No. 31 approaching. The freight train, which consisted of 12 to 15 cars and extended eastward from the crossing, made that practically impossible. And further, out beyond the east end of the freight train there was another string of freight cars shutting off a view of No. 31, even when it was quite a long distance east of the crossing. The evidence also shows that the engine of the freight train was making so much noise that it was highly improbable that any of the children could hear No. 31 coming. There was another circumstance of importance, and that was, that the attention of the plaintiff was naturally directed to the action of the switch engine.

It should be noted, also, that the other boy, Redman, who was with the plaintiff, did not stop and look and listen while between the tracks, just as the plaintiff did not, and that the conduct of both boys, and that of the other children who were crossing, was apparently, similar. The court said in C.R.I.& P. Ry. v. Kinnare, 91 Ill. App. 508: "The fact that his companion made the same attenpt under like circumstances indicates that the undertaking was not so apparently perilous as to make it one which no reasonable man would enter upon." In Beecher v. L. I. R. R. Co., 35 App. Div. N.Y. 292, the court said: "If a number of persons possessed of the same information which the deceased had of the surroundings, acted in a manner similar to the way in which he did, under the same circumstances, it would seem to authorize an inference of the exercise of prudence and care commensurate with the supposed surroundings upon which the deceased had the right to rely."

Considering the situation of fact as it existed, according to the evidence, just prior to and at the time of the injury, we are compelled to conclude that it was one fraught with great danger. The children had been waiting some time for the freight train to get out of their way; naturally they were thinking of the freight train and its movements and not of some other train that might come along, unseen and unheard, on the other track. They were interested in seeing the freight back away so that they could go on their way; and, with their minds so occupied, when the freight did back partly away and slowed up and motions were made by Blake, which may have had the appearance of instruction to go on, it cannot be said, within the bounds of reason and common sense, at least, that, when they had passed over the first track in front of the freight engine, they were then guilty of negligence if they did not peer around and look to the east and investigate in order to see if a train they knew nothing about, and which they could neither see nor hear, was coming from the east. Accordingly we are of the opinion that the jury was justified in finding that the plaintiff was not guilty of contributory negligence in undertaking to cross as he did, and in failing, expressly, to look for, and discover No. 31, before he started to cross; and further, that they were justified in finding the defendant guilty of negligence.

It is very seriously contended by the defendant that, inasmuch as the evidence shows that, about one year after the plaintiff received his first injuries, he fell down the front stairway and re-broke his right leg, evidence was inadmissible as to the injurious effects of that fall,

on the ground that there was a new and independent cause intervening between the original injury and the second injury. However, inasmuch as the ambulatory splint was taken off about the end of the first year, pursuant to the advice of his physician, and as he undertook to walk on crutches, also pursuant to the advice of his physician, and as a result of that, together with either weakness or stumbling, he fell down stairs and his leg was again broken in the same place as before, we are of the opinion that it cannot be said that the original injury was not the proximate cause of what took place in the leg after falling down stairs and having it broken a second time. It was obviously a question for the jury. Devlin v. Chicago City Railway Co., 216 Ill. App. 7; Van Cleef v. City of Chicago, 144 Ill. App. 488; Wieting v. Town of Milleton, 77 Wis. 523; Moseth v. Preston Mill Co., 49 Wash. 682; Wilson v. Chicago Heights Term. Trans. Co., 212 Ill. App.271.

Counsel for the defendant make certain objections concerning instructions which were given and instructions which were refused. Seven instructions were given on the part of the plaintiff and fifteen were given on the part of the defendant. Certainly all the law reasonably applicable to the facts in this case and certainly all that was necessary for the instruction of the jury was contained in the instructions that were actually given. More would have been likely to lead to confusion. We have carefully examined all the objections and are of the opinion that they are untenable.

It is further concluded that the damages are excessive. Considering what the plaintiff has suffered and

the seemingly inevitable reduction of his capacity owing directly to the injury and the fact that the record does not disclose that the trial was unfair or that the jury was moved by prejudice or other improper motives, the verdict must stand. Cicero & Proviso St. Ry. Co. v. Boyd. 95 Ill. App. 510.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

313 - 24664

FRANK O. SHAW, Administrator of the Estate of JENNIE O. UHRUS, Deceased,

Appellee,

vs.

SAM GARVIN & COMPANY, a corporation,

Appellant.

216 I.A. 626

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action on the case brought by the plaintiff as administrator of the estate of Jennie O. Uhrus, deceased. A judgment for $1500.00 was recovered, and the defendant has prosecuted this appeal. The evidence shows that on August 13, 1915, between 2:00 and 3:00 P.M., Jennie O. Uhrus (hereinafter called the deceased) was walking west on the south side of Huron street, towards Cicero avenue, the nearest north and south street; that as she neared the southeast corner of that intersection she turned and went in a general northwesterly direction, going over the parkway and the sidewalk to the curb; that Cicero avenue outside the street car tracks was paved with brick and it had been raining slightly; that at or near the curb she stumbled and fell out into Cicero avenue; that a Willys Utility, thirty-five horse power, truck containing a load of 1200 to 1500 pounds, driven by a chauffeur of the defendant, going at a speed

of 10 to 20 miles an hour (the rate is in dispute), almost at the instant at which she fell, struck and ran over her causing her death.

The important questions of fact are, the rate of speed at which the truck was going, and the distance it was from the deceased at the time she fell. One Belanger, who was about 180 to 200 feet south of Huron on Cicero at the northeast corner of Erie street, 35 to 40 feet north of Erie street, said the truck was going from 18 to 20 miles an hour. A boy, Aston, who was between nine and ten years old, at the time of the trial, and only between six and seven when the collision took place, said that he was up a tree about 150 feet from Cicero avenue at the time; that it started to rain; that deceased started to run; that when she fell he got down and ran to where she was. He does not mention the speed at which the truck was going. Anna Adams, who was working in a cigar store, located one lot in width from Erie street, stated that the truck was going about 15 miles an hour. The witness, Jennie Aston, stated that she was walking a few yards behind the deceased when the latter was near Cicero avenue; that the deceased was walking at a moderate speed and fell when the witness was a few feet from Cicero avenue; that at the time the deceased fell the truck was about 50 feet south of her; that the truck did not swerve but went straight on the east side of Cicero avenue going north; that deceased was within a foot of the curb line of Cicero avenue when she was struck; that she heard no bell nor horn; that at the time it had just begun to rain.

Robert McCants, a porter who was washing windows

in a building just north of Erie street, stated that the truck was going about 10 to 11 miles an hour; that it looked as though deceased stumbled and fell; that there was a stump of a telegraph pole and a stone or brick at the corner, and it looked as if she stumbled and fell over some object; that the truck was running between the street car tracks and the curb; that it looked as if she started to run; that he was nearly a block away from the accident; that he did not know whether it was a woman or a child at the time he saw her fall; that she fell from the sidewalk.

Carlton F. Jacobson, who was standing near Erie street, stated that he saw the truck go by and a few seconds later heard a scream and looked north and saw deceased underneath the truck; that the truck was going 9 or 10, or it might have been 12 miles an hour when it passed him; that he did not know whether it speeded up after it passed him. The driver, James McBride, stated that he was going from 10 to 12 miles an hour; that he had gotten near Huron street when the deceased, about eight feet in front of him, suddenly dashed out and stumbled in front of him; that he swung the wheel around with both hands, put out the clutch and put on the brake; that the right wheels passed over her; that when he first saw her he thought she was going to stop; that she hesitated, then started to run, then tripped on something and fell right in front of him; that he did not have time to blow his horn or put on the emergency brake; that he stopped when about eight feet after the truck passed over the body; that it was his judgment he could not have stopped the car, with the emergency brake, in eight feet when going ten miles an hour; that it would take 15 or 16 feet.

An experienced driver, Gannot, gave it as his opinion that such a truck loaded, as the one in question was, could be stopped when going 8 to 10 miles an hour in seven and a half to eight feet; when going 10 to 12 miles an hour, in about 9 feet, and when going 18 to 20 miles an hour in 25 feet.

After a careful analysis of the evidence, we are of the opinion that it would be unreasonable for us to conclude that the jury was not justified in finding that the deceased was not guilty of contributory negligence. The question then remains, was the driver of the truck guilty of negligence; and as to that the question arises, did the evidence sufficiently show that he was going at too great a speed, under the circumstances, and did he do all that could reasonably be expected to avoid the collision; or, in other words, does the evidence on those two subjects sufficiently support the verdict of the jury.

From the evidence, it appears that the jury was justified in concluding either that the driver could have stopped in time, or that he was driving at a speed that was evidence of negligence. If, after seeing her down in the street, in the direction he was driving, he failed to exercise ordinary care to avoid injuring her, he was guilty of negligence. There was sufficient evidence, if believed by the jury, that when she fell into the street, the driver of the truck was fifty feet away from her; also, and it is that of the driver, that he could have stopped the truck in 15 to 16 feet. There is evidence, even, that the truck, if going 10 to 12 miles an hour, could have been stopped in 9 feet. The expert witness stated that such a truck, loaded

as it was, if going 8 to 10 miles an hour, could be stopped in seven and a half to eight feet. The evidence presented to the jury - particularly that of Jennie Aston, who was practically right at the place and who was but a few feet behind the deceased at the time of the injury, and who said that, at the time the deceased fell, the truck was about 50 feet south of her - would fully justify the jury in concluding either that the truck was going at an unreasonable speed and that the driver even after noticing or seeing the danger, could not stop in time; or that, after knowing the danger, he failed to do his duty.

The witnesses Belanger, McCants and Jacobsen were too far away to the south to know as well as Jennie Aston, the speed of the truck at the time it struck the deceased. The driver sounded no horn and gave no warning. That, he explained, by saying he did not have time. Also, he did not put on the emergency brake, and he says, for the same reason.

Taking the evidence all in all, we do not feel justified in overruling the verdict of the jury. Counsel have very ably presented the cause of the defendant; still, as we do not feel that it would be reasonable to infer that the evidence shows that the deceased when she fell out on the street was negligent, and as we are not satisfied that the jury erred in concluding that the driver was negligent, we must refrain from reversing the judgment.

The objections made to the declaration are untenable. We are of the opinion that, after judgment, the first count was good. City Railway Company v. Jennings, 157 Ill. 274; City of Chicago v. Selz Schwab & Co., 202 Ill. 545;

Chicago, Burlington & Quincy Rd. Co. v. Harwood, 90 Ill. 425. Also, the objection, made to the instruction number two is untenable. Norton v. Valzke, 158 Ill. 402; Springfield Coal Mining Co. v. Grogan, 67 Ill. App. 487.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

394 - 24747

GORDON A. RAMSAY, Administrator of the Estate of Esther Nixon, Deceased,

Appellee,

vs.

EASTER LILY CLUB,

Appellant.

2161.A. 626

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff as Administrator of the Estate of Esther Nixon brought suit against the defendant, Easter Lily Club, to recover certain sick, nurse and funeral benefits. The statement of claim alleges that Esther Nixon was a member of the defendant club and, during her life time, had paid in all required dues and assessments; that on or about October 31, 1917, she became sick and disabled and remained so until the day of her death, February 11, 1918; that during said period of illness she required constant nursing and attention; that as a result of her illness and death the said defendant is indebted to the plaintiff for the use and benefit of the heirs at law of the said deceased as follows: For weekly sick benefits, 14 4/7 weeks at $5.00 per week, $72.85; 45 days nurse fees at $1.10 per day, $49.50; burial benefit $75.00; total $197.35. The case was tried in the small claims court where no affidavit of merits is required of the defendant.

The evidence is substantially as follows: Esther Nixon became a member of the defendant organization on April 19, 1917, and in August, 1917, or some time prior thereto was attacked with tuberculosis, of which disease she subsequently died. The by-laws of the organization provide that "In case of sickness a member shall notify the Financial Secretary at once with a doctor's certificate whenever a member is sick"; that "No member of this club shall receive benefits for any disease contracted before becoming a member of the Easter Lily Club"; that "If a member becomes sick before the expiration of six months, she shall not receive any benefits for that continued illness."

Further, Article 4, provides as follows: "The fee to join this Club shall be and is one dollar ($1.00), dues thirty (30) cents per month; taxes fifty (50) cents per year; death assessments, fifty (50) cents per member. Sick benefits shall be four ($4.00) per week for twenty-four (24) weeks and two ($2.00) per week thereafter as long as disabled. No person shall receive sick benefits until she has been a member six months. Count shall begin with the night of initiation. The president and chairman of the sick committee shall be notified at once, stating the nature of the case, a doctor's certificate must be sent to the club each week while the member is on the sick list. No benefits for confinements. Funeral benefits shall be and are $75.00."

That Esther Nixon became a recognized member of the defendant club on April 19, 1917, is shown in the testimony of Emma Smith, who, at the time of the

trial, was president of the club. She further testified that Esther Nixon remained a member of the club until she died.

The witness Lulu Watson testified that she first observed Esther Nixon being ill, in September, 1917; that she died in the Cook County Hospital in the tuberculosis ward; that she did not know whether or not she had tuberculosis when she joined the club. The witness Louise Hawkins testified that she told the husband of the deceased that his wife contracted the disease either before she became a member of the club or within six months after and that the club would not pay any sick dues because the by-laws provided that nothing would be paid on account of any disease contracted either before becoming a member or during the first six months after becoming a member. There is no material evidence going to show that Esther Nixon actually had tuberculosis at the time she joined the defendant club.

The court found the issues for the plaintiff, and assessed the plaintiff's damages in the sum of $75.00.

It is contended by the defendant that certain evidence was improperly rejected, and that the judgment is manifestly against the weight of the evidence. Apparently the judgment was based upon that part of Article 4 which provides that; "Funeral benefits shall be and are $75.00." No allowance was made for sick benefits or nurses fees. We are of the opinion that the judgment must stand.

The constitution of the defendant club consists of ten articles and the by-laws of 13 sections. They are

very inartistically drawn. In reading them over, however, and giving them a common sense interpretation our conclusion is that the words, "Funeral benefits shall be and are $75.00", constituting the last sentence in Article 4 of the constitution, bind the defendant, on the death of any member in good standing, to pay $75.00. We cannot agree with counsel for the defendant that if the deceased contracted tuberculosis within six months after she became a member the liability under Article 4, as to funeral benefits, would not arise. There is some faint evidence that the deceased may have had incipient tuberculosis at the time she joined the club but it is not sufficiently substantial to justify finding such to be the fact.

It is further contended that the testimony of the husband should not have been received. All the materials facts, however, to which he testified were proven by other witnesses, so that the error, if any, was harmless. As to the contention that the trial judge was in error in refusing to allow the witness Lulu Watson to testify to a conversation with Esther Nixon during her illness; the law is well settled that such testimony is inadmissible.

Being of the opinion that, under the constitution and by-laws of the defendant club, whether or not Esther Nixon contracted tuberculosis within the first six months of her membership, is immaterial, the judgment must stand.

Finding no errors in the record the judgment is affirmed.

AFFIRMED.

415 - 24768

LAWRENCE LINDGREN,
Appellee,

vs.

FRANK PARMELEE COMPANY,
a corp.,
Appellant.

216 I.A. 627

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Claiming that a horse and wagon belonging to the defendant and driven by one of the defendant's employees, collided with an automobile of the plaintiff, the latter brought suit for damages and recovered a judgment for $134.25 and costs. This appeal is taken therefrom.

The declaration alleges, inter alia, that on October 29, 1917, when the plaintiff, in the exercise of care, was driving his automobile west on Jackson Boulevard at its intersection with Franklin street, the defendant negligently drove, in a southerly direction on Franklin street, a horse drawn vehicle, without due regard for the safety of others and in violation of an ordinance of the City of Chicago and, as a result, struck and ran into the plaintiff's automobile and damaged it.

At the trial four witnesses were called; J. L. Bender, Lawrence Lindgren and Harry E. Roberts for the

plaintiff; and John Grannahan for the defendant. Lindgren, the plaintiff, testified that on October 29, 1917, between eleven and eleven thirty, P.M. he was driving a Chevrolet automobile, which was his property, west on Jackson boulevard; that as he approached Franklin street he saw the horse and wagon of the defendant going so th on Franklin; that he "saw there was an accident coming so I put on my brakes and turned south and tried to avoid him, but he just kept on coming and he hit my machine in the back on the right hand side"; that the horse was going about 15 miles an hour; that the horse was trotting; that Jackson boulevard is a public street and boulevard; that the wagon did not come to a stop at the boulevard; that he was driving his own automobile at about 15 miles an hour; that as a result of the collision the rear panel of the automobile was crushed in and lapped over and the woodwork on the inside broken up; that the rear tank and tire irons were bent; that one of the tire irons cut into a new spare casing on the back of the machine; that "it bent the axle or propeller shaft or something in the machine." On cross examination he stated further that the car was a left hand drive; that he was at the wheel; that one Bender sat at his right in the front seat; that all four corners at the intersection are built up with business blocks; that his car was lighted; that the pavement at the place of the collision was asphalt; that at the time it was snowing and the pavement was slippery; that when he first saw defendant's wagon he was about 20 feet east of Franklin street; that when he saw the wagon he put on his brakes and turned in the direction the wagon was going; that the left and front corner of the wagon hit the rear of

the automobile; that at the time of the collision four or five trunks fell off the wagon at about the center of the intersection; that at the time of the collision the front end of the wagon was north of the center of Jackson boulevard; that "he was coming fast and my brakes were going on and naturally I was going slower than he was and he kept on going south"; that he had both brakes on.

The witness, Bender, for the plaintiff, testified that he was with the plaintiff at the time of the collision; that he did not see the wagon until "it was almost on top of us"; that it did not stop at the boulevard; that as a result of the collision the gasoline tank was knocked off the car and also a tire on the back; that some of the trunks fell off the wagon. On cross-examination he stated that the automobile was going about fifteen miles an hour; that at the time it was snowing; that there were no chains on the wheels; that the automobile stopped within a few feet after the collision and was then facing towards the southeast corner of Jackson and Franklin, about ten or fifteen feet from the corner; that there are two car tracks on Franklin street.

The witness, Roberts, for the plaintiff, testified that at the time he was driving a taxi going east on Jackson boulevard; that as he slowed up at Franklin street he saw a wagon going south on that street; that the horse was trotting; that an automobile was coming west on Jackson boulevard; that as the automobile reached a point in front of the entrance of the Northwestern building, at the northeast corner of the intersection, the driver of the automobile "started to slack up and turned his car to the south to avoid

a collision, and the wagon, the front part of the wagon, hit the rear end of this man's car"; that the wagon did not stop at the beginning of the intersection. On cross-examination, he testified that the wagon was traveling in the southbound car track on Franklin street; that it was going about ten to twelve miles an hour; that the left front of the wagon struck the automobile; that the collision took place at the center of the intersection; that, of the trunks that fell off the wagon, one fell in the center and one or two a little north; that on each of the streets there was plenty of room for four cars, abreast, to pass; that the automobile, after being struck, went about five feet and then stopped; that the wagon went right on to about ten feet south of Jackson boulevard.

The witness, Granahan, the driver of the horse vehicle, testified for the defendant that he was driving a wagon load of trunks from the Northwestern to the Baltimore and Ohio station; that he stopped his wagon at the north side of Jackson boulevard and looked east and west to see if any automobile was coming; that the pavement was slippery as it was both snowing and freezing; that his wagon was in the southbound car track on Franklin street; that when he first saw the plaintiff's automobile it was just west of Fifth avenue, which is the next street east of Franklin street; that in crossing the boulevard the horse which he was driving slipped and fell on his front knees and plunged to get up again; that when the vehicles collided the rear wheel of his wagon was about the center of Jackson boulevard; that the rear end of the automobile struck the rear end of the wagon and knocked six trunks off it into

the street; that they fell more south than north of the center; that his wagon went about seven feet after the collision; that the only part of the wagon that came in contact with the automobile was the left rear wheel. On cross-examination, he stated that he came to a dead stop before he drove into Jackson Boulevard; that the collision occurred about the middle of the boulevard.

The plaintiff offered in evidence an ordinance of the City of Chicago which was passed January 19, 1917, and provides that it shall be unlawful to drive "onto any boulevard within the city limits of the City of Chicago without first bringing such vehicle to a full and complete stop". It was stipulated that, if a certain witness was present, he would testify that the reasonable and customary charge for repairs to the automobile would be $134.25. The cause was tried without a jury and judgment entered in favor of the plaintiff and against the defendant in the sum of $134.25.

It is obvious, after analyzing the evidence which was introduced, that the determination of liability depends upon the comparative trustworthiness of the testimony given by the four witnesses. If the court believed the witnesses for the plaintiff, that the wagon was being driven from ten to twelve or fifteen miles an hour and that the driver made no stop at the entrance to the intersection; and, further, believed the testimony of the plaintiff's witnesses as to the speed of the automobile, that it was going about fifteen miles an hour, then there was ample evidence to support the judgment. Kilroy v. Justrite Mfg. Co., 209 Ill. App. 499. In the latter case occurs the following language; "Plaintiff had a right to assume that defendant's

driver would in this regard observe the ordinance, and plaintiff cannot be held to have been negligent in acting upon such an assumption. The failure to observe this ordinance was negligence attributable to the defendant which was the proximate cause of the accident."

The evidence may give rise in our minds to some suspicion that the plaintiff was driving much faster than fifteen miles an hour, but that is not sufficient to justify us, under the circumstances, in overruling the determination of the trial judge. As to the claim by the defendant that, "there was no evidence before the court as to amount of damages"; inasmuch as it was stipulated, by counsel for both parties, that a certain witness, if present, would testify that a reasonable and customary charge for the repairs of the automobile "would be about the figure of $134.25", it follows that the trial judge upon concluding that the defendant was liable for whatever damages the plaintiff suffered was then justified in fixing the judgment at the amount mentioned in the stipulation.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

499 - 24853

216 I.A. 627

BESSIE BERGER,

Appellee,

vs.

ISRAEL BERGER and
TILLIE BERGER,

Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 1, 1917, the plaintiff, Bessie Berger, began an ejectment suit in the Superior Court against the defendants, Israel Berger and Tillie Berger. On June 7, 1917, the plaintiff filed a declaration and recited therein, among other things, that on June 9, 1915, she, the plaintiff, became possessed of a certain flat in Chicago known and described as:

> "The second flat in the front of the premises known as 1037 South Racine Ave., Chicago, Illinois, which said premises the said plaintiff, Bessie Berger, claims as owner thereof, and as such, entitled to the immediate possession thereof; and the said plaintiff, Bessie Berger, being the owner thereof and being so possessed thereof the said defendants, Israel Berger and Tillie Berger, his wife, afterwards, to-wit: On the first day of July in the year of our Lord, one thousand nine hundred and fifteen, entered into the said premises and ejected the said plaintiff, Bessie Berger, therefrom, and unlawfully withhold from the said plaintiff, Bessie Berger, the possession thereof to the damage," etc.

On July 15, 1917, the defendants filed a plea alleging, among other things, that the plaintiff had no

title to the property in question and on November 26, 1917, filed certain other pleas. The latter need not be considered.

The cause was tried before a jury and on April 17, 1918, the following verdict rendered:

> "We, the jury, find the defendants guilty of unlawfully withholding the possession of the property described in the plaintiff's declaration, and that the right to possession of said property is in the plaintiff."

On April 17, 1918, an order was entered that,

> "the plaintiff do have and recover of and from the defendant the possession in fee simple of that certain flat or apartment, with the appurtenances, situated in Chicago, in the County of Cook and State of Illinois, described as follows: The second flat in front of the premises known as 1037 South Racine Ave., Chicago, Ill., and that a writ of possession do issue therefor and that the plaintiff do have and recover of and from the defendants her costs and charges in this behalf expended and have execution therefor to which the defendants except."

It is claimed by counsel for the defendants that no valid judgment could be had upon the verdict and that, therefore, it was fatally defective; that inasmuch as the judgment provides that the plaintiff have and recover from "the defendant" possession of "the second flat in front of the premises known as 1037 South Racine avenue, Chicago, Ill." it does not follow the declaration or the verdict.

We are of the opinion that both the verdict and the judgment are correct. It is true that the statute provides under Section 30, Paragraph 7 of Chapter 45, on Ejectment, that, "The verdict shall also specify the estate which shall have been established on the trial, by the plain-

tiff in whose favor it shall be rendered, whether such estate be in fee or for his own life or for the life of another, stating such lives, or whether it be for a lien of years, and specifying duration of such term," but when the verdict, as in the instant case, finds the defendants guilty of unlawfully withholding the possession of the property described in plaintiff's declaration and there is a description of the property in the declaration, we are bound, in all reason, to hold that the statute has been complied with. Hadlock v. Hadlock, 22 Ill. 384; Minkhart v. Hankler, 19 Ill. 47.

The meticulous criticism that the words "the second flat in front of the premises" describe property that is, in the language of counsel for the defendants, "not on the premises in question but is in front of the premises", we are unable seriously to entertain. A set series of words, which, when technically construed as a matter of language, contain a double meaning, should be given that meaning, and considered as having only that meaning, which they and their context and common sense obviously suggest.

The words in the declaration are; "The second flat in the front of the premises known as 1037 South Racine Ave." The words in the judgment order are; "The second flat in front of the premises known as 1037 South Racine Ave." The difference is that in the declaration the definite article precedes the word front, and in the judgment order it is omitted. We are of the opinion that, reasonably interpreted, each description is sufficient.

It is further contended on the part of the defendants, that the judgment which was entered was not entered against both the defendants. In the order of April 17, 1918, the words were used, "the plaintiff do have and recover of and from the defendant". That, of course, is in the singular, but in the latter part of the order occur the words "and that a writ of possession do issue therefor, and that the plaintiff do have and recover of and from the defendants her costs and charges in this behalf expended, and have execution therefor, to which the defendants except." In the verdict of the jury the words occur: "We, the jury, find the defendants guilty" etc. The record shows that the defendants in their special plea both admitted that they were in possession. Evidently the use of the word defendant in the singular instead of the plural in but one instance, and that in the early part of the order of April 17, 1918, was a clerical mistake, and as stated by the Supreme Court in Hofferbert v. Kinkhardt, 58 Ill. 450; "so slight a mistake, when we can see from the context what was clearly intended by the court, ought not to vitiate and render void a judicial record. * * * It would be trifling with the forms of justice to entertain an objection so trivial and devoid of actual merit."

Finding no error in the record the judgment is affirmed.

AFFIRMED.

281 - 25158

P. B. VAN SCHREER,
Appellee,

vs.

LONDON GUARANTEE & ACCIDENT COMPANY,
Appellant.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

21 I. A. 627

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This suit grew out of a claim by plaintiff, a physician, for medical services rendered various persons at Alton, Illinois, who were injured while in the employ of defendant's assured. Upon trial by the court the issues were found against the defendant and judgment entered on the finding in the sum of $267, from which defendant appeals.

The suit is on contract, and the statement of claim sets out that the services were rendered in pursuance of an agreement entered into between the parties on or about the 16th day of July, 1914. The abstract here filed does not inform us what the alleged agreement was, but refers merely to "Exhibit A" and "Exhibit B," without a word as to their contents. Also many letters were introduced in evidence which it is said show the relations between the parties, but the abstract gives no suggestion as to their contents. Other evidence also is omitted. However, it is a fair inference from what does appear that plaintiff properly proved his employment by the defendant and rendered the services for which he claims payment.

Under a series of holdings by both this and the Supreme Court, the abstract is the pleading of the party presenting it, and must contain sufficient of the record to enable the reviewing court to determine the force of the errors assigned. As will

not go to the record to discover grounds for reversal, Lanning v. Tobey Furniture Co., 211 Ill. App. 522; Barber v. Mellish-Hayward Co., 209 Ill. App. 299, and cases cited.

Furthermore, the filing of an incomplete abstract is violative of Rule 18 of this court. Where such a failure occurs, and the evidence as ascertained from the statements in the briefs is conflicting, the judgment will not be disturbed. Barber v. Mellish-Hayward Co., supra; Campbell v. Campbell, 279 Ill. 337.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

303 - 25180

STOHN BROS., Inc.,
Appellee,

vs.

PHILIP A. NAUGHTON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

216 I. A. 627

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and, upon trial by the court, had judgment against the defendant which we are asked to reverse.

Defendant in his abstract of the statutory record sets forth the finding and judgment of the court as follows: "Finding. Motion for new trial and in arrest. Order overruling motions. Judgment order." This gives us no information whatever as to the finding and judgment of the court of which complaint is made, so that we do not know whether they were justified or not. It has frequently been held that the abstract is the pleading of the parties and must show the record of the trial court that the court of review may be so informed as to what took place as to be able to judge whether or not error was committed. Manning v. Tobey Furniture Co., 211 Ill. App. 522; Harber v. Mellish-Hayward Co., 209 Ill. App. 299, and cases cited. Not being informed as to what the judgment of the trial court was, it will not be disturbed.

Plaintiff by its statement of claim asserted that, relying on certain representations made by the defendant, it sold certain goods to the J. & C. Corset Company for which it has not been paid; that the said representations made by the defendant were untrue, and that the defendant knew that they were false and

fraudulent when they were made, and that they were made solely and only for the purpose of fraudulently and illegally securing said merchandise from the plaintiff. We hold that from the evidence the court could properly find that the defendant made representations as asserted in plaintiff's statement of claim, beginning on April 4, 1917, and that he is liable for the sales made to the J. & O. Corset Company subsequent to that date.

Plaintiff by cross-errors questions the amount of the judgment entered by the trial court, which it is conceded was based upon the figures appearing in plaintiff's statement of claim. If this is true, it was the result of plaintiff's own mistake in giving an erroneous amount in its statement. However this may be, in the absence of a proper showing to this court as to the amount of the judgment entered, we cannot undertake to change or modify the same.

The judgment is affirmed.

AFFIRMED.

311 - 25189

MARTHA M. SEEBERGER et al.,
Appellees,

vs.

CHARLES M. SEEBERGER,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

216 I.A. 627

MR. PRESIDING JUSTICE McBURNEY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit alleging that the defendant had received certain cash for the use of the plaintiffs. Upon trial, at the conclusion of all the evidence, the court instructed the jury to find for the plaintiffs and to assess damages at the sum of $5,787.50. A verdict was returned pursuant to this, upon which judgment was entered. Defendant asks that it be reversed.

The declaration alleged that on or about May 1, 1908, the defendant had received the sum of $5,000, being the proceeds of a life insurance policy on the life of George Seeberger, the father of plaintiffs, and which was caused by him to be made payable to his brother Charles, the defendant, in trust for the plaintiffs, who were then infants. To support this claim plaintiffs proved that they were the children of George Seeberger, defendant's brother; that their father was killed in a store owned and conducted by him in Chicago, in the year 1907, at which time the plaintiffs, Martha M. and Elsie M. Seeberger, were minors; their mother had died several years before, so that by the death of their father they became orphans.

A few days after their father's funeral the plaintiffs, with their grandfather and grandmother and another uncle, met at the store which had been conducted by their father. Defendant was also

present, and produced from the room formerly occupied by George Seeberger a box which he opened and which contained the private papers of George, among which was a life insurance policy for $5,000, in which the defendant, Charles Seeberger, George's brother, was named as beneficiary. All of these persons testified as witnesses upon the trial, and all of them, except the defendant, testified that defendant then informed them that this $5,000 policy had been taken out by George for the benefit of his children, the plaintiffs, but had been taken in the name of the defendant, Charles Seeberger, so that he could handle and put it out at interest for George's children. Plaintiffs' evidence further showed that from May 1, 1908, to November 1, 1916, defendant paid to the plaintiffs interest at the rate of six per cent. per annum; that when these installments of interest were paid they were accompanied by letters written by the defendant in which the payment was described as the interest on the aforesaid $5,000. Occasionally the letters indicated that the interest was not paid promptly by the party to whom the money had been loaned, at which times defendant would state that he was advancing the interest out of his own funds. Most if not all of these semi-annual payments were accompanied by letters written by the defendant, in which the remittances are described as "interest due." These letters so specifically and clearly fix the character of these payments as interest on the $5,000 invested for the benefit of the plaintiffs, as to negative completely any suggestion that they were mere gratuities.

Defendant takes the position in this court that he has denied the statement of the beneficial interest of the plaintiffs in the policy, testified to by the plaintiffs' witnesses, hence the trial court should have permitted the variant stories to be submitted to the jury. Ordinarily this would seem to be

true, but an examination of the record, with special reference to the questions put to the defendant upon the trial and his answers thereto, discloses that defendant did not specifically deny the statement attributed to him. The question put to him is long and includes not only the alleged statement but, conjunctively, other matters referring to a policy upon the life of the defendant for the benefit of a son of his. This latter matter is irrelevant, and its truth or falsity immaterial. Defendant may have been warranted in denying that he said all of the things contained in the question, but such a negative would not amount to a denial of the pertinent and material question as to his statement concerning the purpose of the particular policy in question. It is rather suggestive that while he was interrogated specifically as to the existence of a policy for the use of his own son, he was not questioned specifically as to the particular policy involved in this case.

We have here what has sometimes been called a negative pregnant, where the denial of the conjoined facts is consistent with the truth of any one of the separate facts. Some of the reported cases go so far as to construe such a denial as an admission of every material fact contained in the question. The rule is stated in 31 Cyc. 205 thus: "Where a number of facts are alleged conjunctively by plaintiff, and the answer denies them conjunctively, it is held that the denial goes only to the conjunction and admits the separate existence of each fact, or goes only to certain facts and admits the others." Among the cases supporting this rule are: Ex parte Hall, 107 U. S. 265; Young v. Catlett, 6 Dner 437; Pullen v. Wright, 34 Minn. 314; Curnow v. Phoenix Ins. Co., 46 S. Car. 79; Buch, etc. Co. v. Montana L. & I. Co., 15 Mont. 345; Davison v. Powell, 16 How. Pr. 467. That these

cases have to do with code pleadings does not lessen the sound logic of the rule. In the large latitude of oral testimony by witnesses it is a very simple and easy thing to adduce a specific and categorical denial of a material assertion by the other side, and if the question put to the defendant and his answer failed in this regard he must suffer the disadvantage regardless of his intentions.

There is considerable force in the point by plaintiffs' counsel that even if defendant had denied the statement said to have been made by him when the policy was produced, yet his letters and remittances of interest covering a period of over eight years so completely minimize the force of the denial as to bring it within the rule that where testimony is too inconclusive and unsubstantial to be the foundation of a verdict it is proper for the court to direct a verdict, as in cases where there is no evidence. This practice was approved in Offutt v. Columbian Exposition, 175 Ill. 472, and Woodman v. Illinois Tr. & Sav. Bank, 211 Ill. 578.

Complaint is made that the court refused to permit defendant to testify as to moneys said to be loaned by him to George Seeberger. A number of leading questions touching upon this point were put to the witness, and objections to them properly sustained. Defendant did not make any offer as to what he expected to prove in this regard. We cannot predicate error upon expected answers the substance of which does not appear in the record. Such answers may or may not have been material, or may have been wholly lacking in probative force. Ittner Brick Co. v. Ashby, 198 Ill. 568.

Reversible error is said to have been committed by the trial court in refusing to give to the jury written instruc-

tions tendered by the defendant, and in refusing to allow defendant's attorney to address the jury. After the court had decided to instruct the jury peremptorily, the giving of further instructions or argument to the jury by counsel would be entirely useless and superflucus. There was no error in this regard.

Under the record made by the parties the court was justified in its rulings and in its direction to find for the plaintiffs, and we see no reason to reverse. The judgment is therefore affirmed.

AFFIRMED.

323 - 25201

JAMES F. HALL,
Appellee,

vs.

MAMIE E. HALL,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

216 I.A. 628

MR. PRESIDING JUSTICE McCREDY
DELIVERED THE OPINION OF THE COURT.

This is a proceeding for divorce in which the husband charges the wife with adultery, and apparently the defendant countercharged with a cross-bill; this latter, however, is not before us. This controversy between the parties has been in this court before. See Hall v. Hall, 201 Ill. App. 589. We there held that it was erroneous to refer such a cause to a master in chancery. Upon reversal and remanding the cause proceeded to trial before a jury, which found that the evidence supported the allegations of the bill, and a decree pursuant thereto was entered. From this defendant appeals.

It does not seem to be seriously controverted that the evidence justified the finding of the jury as to the guilt of the defendant. Examination of the record leads to the conclusion that the charge of the bill was abundantly supported.

The only points requiring attention upon this appeal relate to some technical matters. The point is made that at the time of the trial and entry of the decree the bill and answer were lost and were not restored until several terms after the entry of the decree. There is no merit in this. It is not properly assigned as error. The only assignments of error are those filed with the short record on March 5, 1919, and this point is not there made. No order of this court was entered permitting the finding of

any additional assignments of error, as required by Rule 12. Furthermore, the parties went to trial without objection. Brophy v. Sheppard, 124 Ill. App. 512.

No assignment of error is made touching the introduction of evidence, so that we cannot consider the claim that it was error to introduce evidence tending to prove adulterous conduct by the defendant after the date of the filing of the bill. Even if this point were properly before us, we do not see how the admission of evidence of conduct subsequent to the filing of the bill would require a reversal if the charge mentioned in the bill was sufficiently proven, as is the case here.

As to other alleged errors in the admission of testimony, it is sufficient to say that no assignment of error before us alleges errors with reference to the admission of evidence.

It is said that it was error to decree that the defendant within ten days vacate the premises occupied by her, which was the property of the complainant, on the ground that no such relief was sought by the bill. We are of the opinion that this is not a case adjudicating rights to property. The evidence showed that the complainant owned the property in question, which had been occupied by the parties as their home. Upon the entry of the decree of divorce for her fault, she forfeited all her estate and interest in this property. Chap. 41, sec. 14, Dower (Hurd's R. S.). In Brown v. Smith, 83 Ill. 291, it was said under similar circumstances that "her rights to any and all portions of the house ceased, and had she possessed the least delicacy of feeling, or ordinary sensibility, she would at once have left the premises, without waiting a notice so to do.

After the divorce, her rights terminated * *. She was not a tenant on sufferance, but an intruder from and after * * the day the divorce was granted."

The order to vacate in the instant case was simply in aid of the decree, and was not such relief as was sought to be obtained under section 17 of the Divorce act, involved in Meyer v. Meyer, 255 Ill. 436.

Upon the merits the decree is amply supported by the evidence, and the points above noticed not being of sufficient importance to require a reversal, the decree is affirmed.

AFFIRMED.

335 - 25214

POCAHONTAS COAL COMPANY,
a corporation,
Appellee,

vs.

LEE J. LESSER,
Appellant.

ALL AL FROM MUNICIPAL COURT
OF CHICAGO.

216 I.A. 628

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

On its claim for the purchase price of coal sold and delivered to the defendant, plaintiff had judgment by default for $722.24 from which defendant appeals. Entry of the judgment followed the striking of defendant's third amended affidavit of merits for failure to set up a good and sufficient defense to plaintiff's action.

Defendant's argument here relates solely to the sufficiency of said affidavit of merits. As this court has heretofore stricken the bill of exceptions from the files, the affidavit is not regularly before us for examination. However, from a perusal of the contents of the abstract and briefs, we approve the action of the trial court in refusing to permit it to be filed.

We are impressed with the suggestion of plaintiff's counsel that the various moves of the defendant in this case, including the appeal, were taken for delay, and accordingly will allow plaintiff $72 as statutory damages; the judgment is hereby affirmed.

AFFIRMED WITH STATUTORY DAMAGES.

323 - 24674

CENTRAL ELECTRIC COMPANY,
Appellee,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 628

MR. JUSTICE DIVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court in favor of the plaintiff and against the defendant for $17,500.

The defendant issued a health insurance policy under the terms of which it agreed to pay indemnity to plaintiff at the rate of $250 per week in the event that its secretary, Charles [illegible]. Brown, should suffer a disability, as defined in the following clause of the policy:

> "Non-confining disability that immediately and continuously follows a period of confining disability and results from the illness causing said confining disability and prevents the assured (but not necessarily to the extent of confining him in the house) from performing any and every kind of duty pertaining to his occupation."

No statement of fact is contained in the brief and argument of counsel for plaintiff and we therefore assume that the statement in the brief of defendant correctly states the facts of the case.

It is alleged in the statement of claim filed in the cause that the policy in question was issued December 19, 1912; that it contained a stipulation of warranties which the insured by the acceptance of the policy warranted to be true; that on January 21, 1913, Brown contracted a non-confining disability that immediately and continuously followed a period of confining disability; that the non-confining disability had at all times during its continuance prevented Brown from following every and any kind

ISO A

of duty pertaining to his occupation, and that defendant -

> "agreed and promised to pay to Charles F. Brown so long as he lives and suffers the disabilities above mentioned, the sum of two hundred fifty dollars (250) per week, payable quarterly, in the event of such disability continuing for a period exceeding three (3) months. The payments due because of Charles F. Brown's illness were made payable by the assignment to the plaintiff. That defendant from time to time since January 21, 1913, pursuant to the policy, verbal agreement and assignment thereof, paid as a part of the claims the sum of nineteen thousand, five hundred dollars ($19,500), but thereafter on, to-wit, November 6, 1914, defendant refused to recognize or pay any further claims thereunder; that there is now due the plaintiff from the defendant the one last maturing payment to-wit: thirty-two hundred fifty dollars ($3,250) on said account."

An amended statement of claim was filed which in substance alleged facts showing the value of Brown's services to plaintiff.

April 12, 1915, the defendant filed its amended affidavit of merits in which it alleged that the plaintiff and Brown wilfully and fraudulently represented to defendant that Brown had contracted a serious illness which resulted in necessarily confining him and preventing him from performing the duties of his occupation; that as a result the defendant had paid to plaintiff $20,000; that it had no knowledge, and, in the exercise of care, could not have obtained knowledge of the true condition of Brown's health, etc.

Paragraph 4 of the affidavit of merits alleged in substance that the policy in question was null and void because Brown and plaintiff were guilty of certain breaches of warranties and in making false statements in connection with the contract, in that they made the following statement:

> "No Accident, Health or Life Insurance issued to me has been canceled; nor has any renewal of such insurance been refused; nor has any application ever made by me for such insurance been declined.
> I am in sound condition mentally and physically;"

that the above representations were not true in that Brown had made an application for insurance prior to the issuance of the policy

and such insurance had been declined, of which fact the defendant had no knowledge and, in the exercise of due care, could not have obtained such knowledge; that Brown and the plaintiff had made false statements and warranties as to Brown's mental and physical condition and that "the warranties as to the physical condition of said Charles E. Brown, as heretofore stated, were such that he was not in a sound condition physically at the time and place aforesaid."

In a statement of set-off filed by defendant it sought to recover from plaintiff the sum of $19,500 with interest, which sum had been paid to plaintiff, as alleged in the statement of claim, on the allegation that the defendant was induced to make the payments to plaintiff because of misrepresentations, false statements and warranties made at the time the policy was issued. These misrepresentations, false statements, etc., were substantially the same as alleged in the affidavit of merits. The claim of set-off also set up other facts to the effect that Brown and plaintiff had made other false statements concerning Brown's physical condition and health subsequent to the issuance of the policy.

In an affidavit attached to the claim of set-off it was stated that there was due the defendant from plaintiff the sum of $19,500 with interest thereon; that the nature of the defendant's claim is as follows:

> "For the recovery of money paid by the plaintiff and Charles E. Brown under and by virtue of a policy of insurance which, by reason of the false misstatements or breaches of warranty, was on the date of its issuance, and has at all times since said date been null and void. Defendant hereby refers to the above and foregoing statement of claim of set-off and hereby makes same a part hereof."

On April 17, 1915, motion of plaintiff to strike the amended affidavit of merits, except the second paragraph thereof, was allowed and plaintiff's motion to strike the claim of set-off

from the files was also allowed.

On the trial of the cause Brown was asked the question whether he had been rejected by the Mutual Life Insurance Company in 1905; an objection to this question was sustained by the trial Judge for the reason, as he stated, "the warranty as I understand was stricken from this record by the action of the judge who entered the motion."

We are called upon to decide first, whether the claim of set-off filed by defendant is sufficient. In determining this question we are not much aided by reference to rule 17 of the Municipal court, nor to certain cases construing and interpreting that rule. The matter relied upon by defendant in his claim of set-off is in substance a claim against the plaintiff and its sufficiency should be tested by rules applicable to statements of claim rather than by those affecting affidavits of merits. The charge in the set-off is that the plaintiff and Brown, by false statements and warranties, had induced the defendant, who was charged to be without negligence, to pay indemnities to plaintiff and that these indemnities because of such false statements were recoverable back by the defendant.

It is asserted for the plaintiff that a suit at law will not lie to recover back money paid upon an insurance policy upon the grounds that the policy contains untrue warranties or was issued because of misrepresentations. It is conceded that money paid on mistake of fact can be recovered back in some cases at law and that false warranty is a good defense at law to a suit upon an insurance policy. Counsel for plaintiff relies in part upon the cases of Mutual Life Insurance Co. of New York v. Wager, 27 Barb. N. Y. 354; Smith v. Glen's Falls Insurance Co., 62 N. Y. 85. There can be no doubt that these cases and other cases cited and quoted from by counsel in some measure support their contention.

In "Words and Phrases Judicially Defined," vol. 3, p. 29,054, under "Fraud" it is said that:

> "The same transaction cannot be characterized as a warranty and a fraud at the same time. A 'warranty' rests on contract, while 'fraud' or 'fraudulent representations' have no element of contract in them."

We are not at all certain that this distinction is either logical or that it rests upon any reasonable principle. It is not at all difficult to conceive of cases where a breach of warranty may amount to a gross fraud and the truth of this observation may be well illustrated by reference to the large volume of litigation involving rights claimed under insurance policies. A warranty, specifically as such, may be held under the law to have certain-exclusive characteristics which would authorize much of the reasoning and language found in the cases cited by counsel for plaintiff. This is particularly so in the case of Metropolitan Life Ins. Co. v. Harper, 17 Fed. Cases, Circuit and District Courts, No. 9505, wherein it was held that reason and authority supported the claim that insurance companies are precluded from setting up warranties of which they might have availed themselves in their resistance to payment of claims arising under contracts of insurance. The court in that case held that the evidence showed that alleged false representations had not been proven and it is said "to constitute such fraud the falsity of the answer is not sufficient in itself; it must be combined with the guilty knowledge of its falsity." The defendant was required in the present case to allege and prove fraud on the part of the insured and it cannot rely in its claim of set-off upon mere breaches of warranties which in their nature did not amount to fraud. Many of the authorities to which our attention has been called are cases where insurance companies have

defended actions brought on policies on the ground that material misrepresentations which amounted to breaches of warranties were made by insured or by those for whose conduct he was chargeable. These authorities do not aid us greatly in determining the question under consideration here. Radlesak v. Royal Neighbors of America, 192 Ill. App. 72; Mutual Life Insurance Co. v. Hilton-Green, 241 U. S. 613. Here the insurer is the claimant and it brings its action on the theory that the mi representations made were of such character that a fraud was imposed upon it. The weight of authority is to the effect that where the insurer has paid monies claimed to be due under the policy, it cannot recover back the sum so paid by alleging and proving false answers that merely amounted to breaches of warranty.

In National Life Insurance Co. v. Minch, 53 N. Y. 144, it was held that the time for insisting upon a breach of warranty in an original application for insurance was when the claim was made for payment under the contract; that mere ignorance of a fact xxx which would have enabled an insurer to defend against an action upon a policy is not such a mistake of fact as would enable it to recover back money paid thereunder; that it would be presumed that the insurer either knew the fact or that it intended to waive such defense by voluntarily paying the money. In its opinion the court said, however, that:

> "This rule has no application except in the absence of fraud in procuring the policy and of fraudulent representations made to obtain the money, which were designed to, and did have the effect of preventing inquiry."

It will not be necessary to discuss the question elaborately argued, that a payment made by mistake of fact may be recovered back. Here we have to deal with circumstances which involve a consideration of the doctrine of waiver as applied where insurers have paid claims arising under insurance contracts, and,

as intimated above, this doctrine is not applicable where a claim is made, by way of set-off or otherwise, that a fraud has been imposed upon the insurer.

In Cary v. Nihle, 155 Ill. App. 338, the court said:

> "When one person obtains the money of another, which it is inequitable or unjust for him to hold, the person entitled to it may maintain an action for money had and received for its recovery. It is not necessary that there should be an express promise, as the law implies a promise. It certainly is intended by the statute that any promise to pay money, express or implied, is a proper set-off."

It is our opinion that the trial court erred in striking the claim of set-off from the files. It substantially informed the plaintiff of the nature of the claim relied on by the defendant and that defendant intended under its set-off to allege and to prove that the representations made by insured and plaintiff were false and were made with a purpose to defraud the defendant. It is, of course, needless to say that even in cases where fraud is relied upon as a basis for the recovery back of money paid that no such recovery can be had where it appears that the party claimant has, at the time of such payment, knowledge or by the exercise of diligence could have acquired knowledge of the fraud. Loyal Americans v. Edwards, 106 Ill. App. 399.

Concerning the defense attempted to be set up against the claim for future indemnities, not paid by the insurer, we think the affidavit of merits was sufficient either upon the allegation that the plaintiff was guilty of breaches of warranties, or that a fraud had been perpetrated upon the plaintiff; it was error to strike these parts of the affidavit of merits. Seaback v. Metropolitan Life Insurance Company, 274 Ill. 516.

It will not be necessary to discuss other questions presented in argument in the briefs of counsel, as the cause must be remanded for a new trial.

The judgment of the municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

Mr. Presiding Justice McSurely specially concurring.

I concur in the judgment of the court but not in that part of the opinion holding that defendant is entitled to claim a set-off.

152 - 25024

MARY J. KILLEN, Administratrix of Estate of Charles T. Killen, deceased,
Plaintiff,

vs.

H. EDGERTON VANCE, Executor of the last will and testament of J. Nelson Vance, deceased,
Defendant- Appellant,
and
CHAUNCEY DEWEY, Interpleader,
Appellee.

216 I.A. 628

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Charles T. Killen filed a bill of interpleader by which he sought to have a judicial determination of the ownership of a fund of $2100 which he held as custodian. J. Nelson Vance and Chauncey Dewey each answered the bill, in which answers each asserted ownership to the fund and also to seven shares in an unincorporated syndicate which owned a valuable tract of land in Chicago. A part of this land had been sold by the syndicate and the $2100 fund is the distributive share held by Killen for whomsoever may be held to be the owner of the seven shares, the aggregate value of which, according to Vance, is $37,500.

Charles E. Dewey, father of Chauncey Dewey, and J. Nelson Vance, were originally owners of most of the land syndicate shares. Charles E. Dewey was also originally the principal owner of the capital stock of two corporations which owned large tracts of land in Kansas in which Vance also held certain stock. Chauncey Dewey after the death of his father, Charles E. Dewey, in January, 1904, purchased Vance's interest in the Kansas corporations, and he, Chauncey Dewey, insists that as a part of the transaction Vance sold to him the seven syndicate shares. Vance testified that he did not sell the seven syndicate shares in question to

transaction between the parties included only the interest Vance held in the Kansas corporations.

A decree was entered in favor of Chauncey Dewey and the executor of the will of J. Nelson Vance, deceased, brings the case here by appeal for review.

The two principal witnesses who testified in the cause were Vance on the one side and Chauncey Dewey on the other. They directly contradict each other as to what was included in the transaction which admittedly by both parties involved a transfer of 200 shares in the C. I. Dewey Company and 300 shares in Dewey Land & Cattle Co., the Kansas corporations.

The case has been elaborately argued by counsel for both parties, and the evidence in the record is so voluminous that we are able in this opinion to refer only to what we regard as controlling testimony and facts in the case.

Charles P. Dewey, the father of Chauncey Dewey, and J. Nelson Vance were prior to the year 1904 intimately associated in different large enterprises; they were both men of substantial wealth. The Kansas corporations, originally organized to raise and sell cattle, were later engaged in the business of selling the land acquired for that purpose. The par value of the stock in these corporations which was sold by Vance to Chauncey Dewey was $50,000. Vance's testimony is that the stock was sold to Dewey at this figure. Dewey's position is that he bought the stock in one company at 80¢ and in the other at 50¢ on the dollar, and that the seven syndicate shares were also included in the transaction.

Without attempting to analyze the evidence, we think it fairly shows that the stock in the Dewey Land & Cattle Company, one of the Kansas corporations, was worth at the time of the transaction not less than its par value, $30,000; and this is the price Vance paid Dewey's father for the stock. The evidence is somewhat

vague as to the value of the stock in the other Kansas corporation, but so far as we are able to determine the matter from the record, the par value price at which Vance says it was sold to Dewey was not unreasonable. The evidence discloses that the stock in the Kansas corporations was worth at least $50,000 at the time of the transaction, and while there is some contradiction in the evidence it is also clear that the seven land syndicate shares were well worth, at the time, the sum of at least $20,000, and this is the price at which Killen and Dewey sold the seven shares to Vance at the very time when Dewey insists the syndicate shares were worth much less.

Charles T. Dewey died testate January 16, 1904. Charles T. Killen and Chauncey Dewey were appointed executors by the will, and they qualified as such. The will made certain provisions for deceased's widow and daughter, after which Killen and Chauncey Dewey were bequeathed all the residue of the estate, which was large. Chauncey Dewey later acquired by purchase and otherwise certain interests in the estate which gave him an ownership of about two-thirds of the personal property thereof. Prior to his death Charles T. Dewey had borrowed $20,000 from Vance and to secure the payment of this loan he delivered to Vance his promissory note for the amount due April 4, 1905, and also delivered to him as collateral security eleven shares in the Chicago land syndicate. In November, 1905, the executors by letter offered Vance five of the eleven shares in payment of the note. Vance refused this offer and on November 29, 1905, Chauncey Dewey wrote him offering seven of the shares in payment of the note. This letter was not answered and Chauncey Dewey thereupon visited Vance at Wheeling, W. Va. Chauncey Dewey for some time before this visit to Wheeling had been acquiring by purchase from different persons stock in the Kansas corporations in addition

to the interest which he obtained therein under his father's will.

As a result of the conferences between Chauncey Dewey and Vance at Wheeling, Vance agreed to accept the offer of the seven syndicate shares in full payment of the $20,000 note. The evidence discloses a sharp conflict between the parties to the suit as to the value of these shares. In his letter to Vance in which the seven shares were offered in payment of the note Chauncey Dewey wrote:

> "This as you will see is figuring each share worth only about $3,000. We both feel that this is a sacrifice price."

The interview at Wheeling occurred about January 1st, 1916. The evidence shows that while in Wheeling Chauncey Dewey engaged in two distinct transactions with Vance; in one, as executor, he procured the acceptance by Vance of the seven syndicate shares proposition, and in the other in his individual interest he gave notes for $50,000 payable in three installments for the delivery to him, as conceded by Vance and himself, of the shares in the Kansas corporations. Whether these notes were also given in payment for an agreement by Vance to deliver seven shares of the syndicate stock to Dewey is the crucial question in the case. With reference to the Kansas corporation stock it is agreed that it was to be held by Vance as collateral security for the payment of the $50,000 notes. New corporate stock certificates delivered to Dewey were deposited by him with Vance as security for the payment of the notes within two weeks after this agreement was entered into.

On his return to Chicago from Wheeling on January 1, 1906, Dewey wrote Vance that he had submitted to Killen, his co-executor, Vance's acceptance of the proposition of the seven shares in payment of the note. On February 5, 1906, both executors wrote to Vance as follows:

"Concerning the sale to you of seven certificates of one share each of the Vance & Dewey Land & Investment Co. at $20,000, in payment of the note for the same amount which you hold against the estate, would say that we have decided to accept your proposition, and you may please cancel the note and return the same to us, retaining in full payment of same seven certificates of one share each," etc.

It is evident that the transaction concerning the seven syndicate shares given in payment of the note was not formally closed by all the parties thereto until at least the date of this latter letter, and that this is so is further evidenced by an agreement dated January 31, 1906, which was entered into by Killen and Chauncey Dewey under the terms of which each became bound to endeavor to obtain the consent of others interested in the estate to the arrangement with Vance, or, failing in that, to have the matter submitted to the probate court. On February 7, 1906, Vance sent the cancelled note and the four shares which remained in his possession to the credit of the estate to the executors, who on February 9, 1906, acknowledged receipt of the cancelled note and the four shares.

From our examination of the record we are convinced that the weight of the evidence is decidedly in favor of the contention of appellant. Vance did not become the owner of the seven shares until February 7, 1906, although Dewey's position is that he purchased them from Vance about the first day of January of that year. Vance's acceptance of the offer to receive the seven shares in payment of the $20,000 note was not accepted by Dewey and his co-executor until February 5, 1906. Killen, Dewey's co-executor, testified that Dewey had never informed him at any time or in any connection that he, Dewey, had become the owner of the seven syndicate shares. Dewey did inform the witness of his purchase from Vance of the shares in the Kansas corporations. Further testifying Killen said:

"From the time I made the transaction as executor by which Mr. Vance purchased these seven shares I never heard anything of any transfer of any kind by him of any of these

seven shares, until the certificates were brought in to close up the trade."

Killen, as secretary, had charge of the land syndicate books both before and after Charles F. Dewey's death. This company was not incorporated and Killen testified that subsequent to the alleged sale of the seven syndicate shares to Chauncey Dewey he levied three assessments against the seven shares for the payment of taxes and other charges; these assessments were paid by Vance, notwithstanding the fact that the certificates for the shares were then in possession of Chauncey Dewey. Dewey and Killen occupied the same offices and were intimately associated in financial and corporate affairs and in the estate of Charles F. Dewey, deceased. At the time these assessments were levied Vance appeared on the land syndicate books as owner of the seven shares and they stood in his name thereon during the years 1906, 1907 and 1908. Chauncey Dewey took 2½ shares under the will of his father and he also acquired 1¼ shares from Killen; these shares stood on the books in the name of Chauncey Dewey. Killen testified that he had no knowledge of Chauncey Dewey's alleged ownership of the seven shares until the year 1911 when the closing of a sale of 10½ acres of land owned by the syndicate rendered it necessary to acquire possession of all the outstanding certificates.

It is significant also that the transaction concerning the sale of the stock in the Kansas corporations, as also the details of the sale by the executors of the seven shares to Vance, are definitely shown by the correspondence of the parties and by book entries made by Vance; but no contemporaneous writing was made by Dewey either in correspondence, by book entries or otherwise that corroborates in the slightest degree his assertion that he purchased the seven shares from Vance on January 1, 1906, at the time he, Dewey, acquired the corporate stock. Dewey testified

that three years after the alleged sale of the seven syndicate shares he made an entry on the back of an envelope showing his possession of the certificates. Vance immediately after the transaction made book entries which show only the sale of the corporate stock to Dewey for $50,000. These entries, made in Vance's own handwriting, a photographic copy of which appears in the abstracts, were as follows:

"January 1st 1906

Sold Chauncey	[illegible]	shares	G.	Dewey	G.	for	[illegible]
"	"	500	"	G.	Dewey land & [illegible] Co."		30,000
							50,000

He settled for these shares as follows with notes

Two years	note at 5	$15,000	
Three "	" " "	17 000	
Four "	" " "	18 000	50,000

1906

Feby 5 Took 7 shares for G. Deweys note of [illegible]

1907 Apl 24	Paid 10% assessment on 27 shares				1350
1908 Apl 9	"	1/4%	"	"	675
1909 Apl	"	1/4	"	"	337 50

Have since paid taxes" through Villon."

Vance was the owner of 20 syndicate shares before he purchased the seven shares from the executors. No reference is made in these entries to a sale of the seven shares to Dewey. The letter written by Dewey to Vance on February 7, 1906, speaks of the transfer of the seven shares by the executors to Vance, but nothing is said therein concerning the alleged transfer of the shares by Vance to Dewey. A transfer of the corporate certificates was made by Vance to Dewey, but no similar transfer was made of the seven syndicate certificates.

Certain admissions made by Dewey after the alleged transaction occurred can be understood only on the theory that he

paid par value for the corporate stock and that the syndicate shares were not included in the transaction.

In asking for an extension of time to pay the notes delivered in payment for the corporate stock, Dewey wrote Vance on March 28, 1908, in part as follows:

> "This fact, and the ones above stated, and the additional one that I paid you one hundred cents on the dollar, when I bought Mr. Killen's for eighty, and also paid you par for your land and cattle company stock, which never has, and probably will never pay out so much, should keep you from being," etc.

Vance's sincerity in the matter, we think, is evidenced by the fact that he continued to pay assessments amounting to considerable sums on the seven syndicate shares. Notice of these assessments were sent by Killen to the executors of the estate as well as to Vance and the estate assessments were paid by checks signed by Chauncey Dewey.

The evidence satisfactorily establishes that Dewey got possession of the certificates of the seven shares of the syndicate stock in the manner following: Chauncey Dewey after some extensions of time finally was able on January 9, 1909, by the transfer of telephone bonds, loans, etc., to meet and pay notes delivered by him to Vance. It was at this time that Dewey claimed to have made a memorandum on the back of an envelope concerning his possession of the certificates of the seven shares. In 1911 while title was being made to the land out of the sale of which the fund in controversy here arose, Dewey for the first time produced and claimed ownership of the seven certificates. He testified that the certificates were delivered to him when the payments were made to Vance in January, 1909, together with the canceled notes and the corporate stock certificates, all of which had been held by Vance as collateral. These papers were brought in a large envelope from Wheeling by Vance's

son and delivered to Dewey in Chicago. Vance was asked on the witness stand whether he had consciously, deliberately or intentionally sent the seven certificates to Mr. Dewey at all, and he answered, "I did not. I did not know they came here. I never knew they were here until I got a notice from Mr. Killen three years afterwards. Vance testified that he did not know in what manner Dewey got possession of the certificates.

As stated, the evidence in the record is very voluminous. We have examined this evidence carefully and we are convinced, as stated, that the decided weight of the evidence is against the contention of Chauncey Dewey. Ordinarily where questions of fact arising in chancery suits have been determined by a master in chancery and his report has been confirmed by the chancellor a court of review will not interfere with his conclusions unless error therein is unmistakably shown; but in the present case neither the master who reported conclusions on the evidence, nor the chancellor who confirmed his report, had an opportunity to see the two principal witnesses who testified; their testimony was taken before a master, who subsequently was elected to the bench, and the master to whom the hearing was removed merely examined a stenographic report of the testimony of these witnesses. It is not therefore a case where the master who reported his conclusions or the chancellor had an opportunity to see and hear the principal witnesses.

When consideration is given to the express admissions of Dewey that he purchased the corporate stock for its par value; to his failure to make any memoranda at or about the time of his alleged purchase of the seven syndicate shares by correspondence, or otherwise, or to refer to his ownership thereof in any manner to Killen, whose business it was to keep a record of such transfers; to his failure to pay assessments on these shares, notwith-

standing the fact that he did pay assessments on other shares in which he was interested, it must be held that error was committed in entering a decree in his favor. Vance was admittedly a man of large business experience; he made careful entry in his books of account of every essential fact concerning the agreements made with Dewey on January 1, 1906. These contemporaneous entries corroborate Vance's theory of the transaction in every particular; they not only showed that the stock in the Kansas corporations was sold to Dewey for $50,000, but they also disclosed the cancellation of the $20,000 note for the seven shares which were delivered by the executors to Vance and the payment of assessments thereon by Vance during the years that followed their delivery to him.

The decree of the Superior court will therefore be reversed and the cause remanded with directions to enter a decree in favor of H. Edgerton Vance, executor of the will of J. Nelson Vance, deceased.

REVERSED AND REMANDED
WITH DIRECTIONS.

155 - 25028

J. R. SHAPIRO,
Appellant,

vs.

A. BRELIANT,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I. A. 629

MR. JUSTICE DEVEN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover damages for an alleged failure on the part of defendant to deliver certain personal property in conformity with the terms of the instrument following:

"Chicago, April 20, 1918.
Received of J. R. Shapiro Fifty Dollars ($50.00), being deposit on fifty barrels Kentucky whiskey, 1916 inspection. Price of sale to be $2.32-1/2 per proof gallon in bond, less storage and state and county taxes. Balance to be paid upon delivery of warehouse receipts, or deposit to be forfeited.
Accepted, J. R. Shapiro. A. Breliant."

In an affidavit of merits filed by the defendant the defenses made were that the plaintiff agreed to pay the balance of the purchase money at the Cottage Grove Bank where the certificates were ready for delivery; that on Monday, April 22, 1918, the bank received the certificates and that plaintiff failed to make payment of the balance due thereon; that he asked for time until Wednesday in which to procure sufficient money to pay the balance due under the contract.

Evidence introduced on the trial tended to prove that defendant on April 20, 1918, possessed a large number of whiskey certificates, and that he sold 50 barrels of whiskey, represented by certain of these certificates, to the plaintiff as shown by the instrument above.

The plaintiff received from defendant a deposit of $50 on the sale, the "balance to be paid upon delivery of ware-

house receipts, or deposit to be forfeited." The testimony of the defendant is to the effect that the whiskey certificates which he sold to the plaintiff were to be sent from Cincinnati to defendant not later than Saturday or Monday following April 20, 1918; that the defendant informed plaintiff that the certificates were to come to the Cottage Grove Avenue Bank. The memorandum of agreement is silent as to the time and place for the execution of the agreement, and were there no proof to the contrary the presumption is that delivery was to be made within a reasonable time after the making of the contract.

The case was tried by the court without a jury and judgment was entered in favor of the defendant. Whether this judgment is to be reversed depends altogether upon the evidence which was introduced on the trial. In the presence of a direct contradiction in the evidence as to what place and time were agreed upon for the delivery of the certificates, the problem of determining the truth of the matter rested, under the evidence, upon the trial judge. We readily assent to the principle relied upon by plaintiff that where the time of delivery of goods required under the terms of a contract is not fixed therein, the time for delivery will not be held to be of the essence of the contract. Wilsperger v. Meyer, 217 Ill. 267. And so, also, if the contract is silent as to the place for delivery, such delivery will be held to be the vendor's place of business. Ill. Rev. Stat., Uniform Sales Act, sect. 43.

Complaint is made that the trial court erroneously considered certain testimony given by defendant which tended to establish his defense; this testimony was elicited by plaintiff's counsel under section 33 of the Municipal Court Act. The testimony of the witness upon this examination became proper for the consideration of the trial judge, even though it was favorable

to the witness, although the plaintiff was not concluded by the testimony and had a legal right to rebut it. Substantially the same evidence was brought out on the direct examination of defendant by his counsel. Defendant testified as follows:

> "I told him (plaintiff) I was getting whiskey from Cincinnati; that I had bought so many barrels; that I had too much on hand and was willing to sell at 2-1/2 cents profit; that he could have the whiskey on condition that he got a check on deposit by Monday morning and that I must have the check by Monday morning as soon as I called for it."

We think this testimony was admissible in that it did not tend to vary or modify the terms of the written contract; it only served to make definite and certain wherein the contract was indefinite and uncertain. Union Special Sewing Machine Co. v. Lockwood, 110 Ill. App. 387.

The evidence offered by the defendant tends to show that a direct demand for payment was attempted to be made on Monday morning by telephone at plaintiff's usual place of business. Defendant and plaintiff did have a telephone conversation about four o'clock in the afternoon of Monday, during which, according to his own testimony, plaintiff said he "would come down with a certified check." He did not have the check at this time and he knew that he could not procure a check before the following day. So far as the evidence shows, his first attempt to comply with the terms of his contract was made on Wednesday morning following the Saturday when the contract was entered into, and if defendant's version of the contract be the correct one, then this attempted performance came too late.

The evidence heard upon the trial was contradictory as to what the parties had in fact agreed upon as to the time and place of delivery and as to circumstances attending and preceding the breach of the contract. In this state of the record we are

unable to disturb the finding and judgment of the trial court.

The judgment of the Municipal court is affirmed.

AFFIRMED.

182 - 25058

NEW PROCESS REFINING CO.,
a corporation,
Appellant,

vs.

RUDOLPH H. ROSENBAUM,
Appellee.

216 I.A. 629

APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE DENIS DRIEW DELIVERED THE OPINION OF THE COURT.

A general demurrer filed to a third amended declaration consisting of three counts was sustained by the trial court and the plaintiff electing to stand by the declaration, brings the case to this court to reverse the judgment entered in favor of the defendant in the Superior court of Cook County.

The first count of the third amended declaration charges that -

"at the special instance and request of the defendant, Miles J. Votava, Oliver W. Pitts, Victor J. Bell and Fred C. Adams entered into a written agreement with him, a copy of which is attached hereto and made a part hereof, under and by which the said parties agreed to organize a corporation under the laws of the state of Illinois, to be known as New Process Refining Company, and the said Rudolph H. Rosenbaum, defendant herein, agreed to subscribe for Ten Thousand Dollars worth of the capital stock of said corporation when organized and further agreed to give and turn over his share of the assets in a partnership existing between the said Oliver W. Pitts, Miles J. Votava and the said Rudolph H. Rosenbaum, to the said New Process Refining Company, which said share was to include a formula and secret process for a more economical and advantageous manufacture of kerosene, gasoline, naptha, lubricating oils, gas oils and similar products which he claimed to have invented and perfected."

It was further alleged in this count of the declaration that:

"said secret process was warranted by said defendant, Rudolph H. Rosenbaum, to be a process of great value and that said process would greatly lessen the cost of manufacture of gasoline, naptha and oils and that it was owned by said defendant and that said Miles J. Votava, Oliver W. Pitts, Victor J. Bell and Fred C. Adams, wholly relying upon the said warranty as to said process and the promises of said defendant, entered into said contract; and the plaintiff avers that, in accordance

with the agreement heretofore mentioned, there was organized the New Process Refining Company under the laws of the State of Illinois, which company is plaintiff herein, and that said plaintiff, confiding in said promise and undertaking, and relying on the warranties of the said defendant, afterwards, on or about, to-wit, the fourth day of August, 1916, adopted and ratified said agreement herein referred to, and in consideration of the promises and undertakings of defendant, issued to him stock in said company to the value of $1[illegible]; yet the said defendant, contriving and intending to deceive and defraud the said plaintiff in this behalf, did not perform or regard his said promise and undertaking so by him made, as aforesaid, but thereby craftily and subtly deceived and defrauded the said plaintiff in this, to-wit, that the said supposed secret process and formulae did not provide a method and means for a more economical and advantageous manufacture of kerosene, gasoline, naptha, lubricating oils, gas oils and similar products, but on the contrary thereof, the said process and supposed secret formulae were utterly worthless and could not be and were not made to operate with safety, profit or advantage to said plaintiff and were of no value whatever."

This count further charged that the plaintiff has sustained and suffered certain damages by reason of the alleged conduct of the defendant. We think this first count of the declaration sets out a good cause of action in assumpsit.

It may be quite true, as urged by counsel for defendant, that if we were permitted to read the contract it would disclose, as a matter of fact, that no warranty had been made by defendant as to the quality of the materials which were to be manufactured by the corporation under the instruction and supervision of the defendant, but the contract, which is merely attached to the declaration, is no part thereof. The suit in which plaintiff seeks to recover damages is a common law action and no citation of authorities is needed in support of the proposition that the right to recover in such an action must be found within the four corners of the declaration; that instruments attached thereto as exhibits or otherwise are no part thereof.

The first count in express terms charges a breach of a warranty entered into by the defendant and if the action is an action in assumpsit, as insisted upon by defendant, then the count is not repugnant to a general demurrer.

Counsel have argued with force that no action *ex contractu* can be based upon fraudulent representations, but the count under consideration here seems to us to be good as an *ex contractu* count. It sets up a contract, a warranty therein, a breach of the warranty and resulting damages to the plaintiff.

In view of what has been said it will not be necessary to determine the second point made by defendant, that in an action *ex delicto* for deceit and false representations it is necessary to prove a *scienter*. We are inclined to hold that the second count was defective in that it failed to charge that the plaintiff's directors had not only voted and agreed to pay compensation, but that the plaintiff stood ready and willing to pay the defendant and to perform whatever other obligations may have been imposed upon it by the contract. The contract in question is not set out in this count in *haec verba* nor in substance, nor does it show what obligations were imposed by the contract upon the parties. But whatever may be said as to the sufficiency of this count, the judgment of the trial court must be reversed and the cause remanded to that court with instructions to overrule the demurrer for the reason, as stated above, it is our opinion that the first count was not obnoxious to a general demurrer. *Knapp, Stout & Co. v. Ross*, 161 Ill. 254. In that case the Supreme court held that where a declaration contains several counts, one of which states a good cause of action, a general demurrer will not be sustained even if the other counts are bad.

The judgment of the Superior court is reversed and the cause remanded with directions to overrule the demurrer.

REVERSED AND REMANDED
WITH DIRECTIONS.

209 - 25085

ELMER D. BROTHERS,
Appellee,

vs.

GRACE MARIE HIGGINS,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

216 I.A. 629

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action in assumpsit in the Circuit court of Cook County against the defendant to recover for professional services as attorney alleged to have been rendered defendant in litigation which grew out of the last will and testament of Nancy E. Welch.

Nancy E. Welch died testate April 1, 1915, leaving certain heirs, one of whom was James A. T. Hill, a son of deceased's sister. Hill died intestate April 13, 1915, leaving the defendant as his only heir.

Much space is given in the briefs of counsel to the exposition of facts touching the services performed by plaintiff, which it will not be necessary to refer to at great length in this opinion for the reason that there cannot be much doubt, upon the record, of the extent and the value of the services performed by plaintiff in the settlement of the estates of James A. T. Hill and of Nancy E. Welch in litigation which was instituted to set aside the will of the latter and in a suit to partition certain real estate. The case was tried before a jury which assessed the plaintiff's damages at $7,500; judgment was entered on the verdict for this sum, and the defendant by her appeal to this court seeks to reverse this judgment.

It is insisted on behalf of the defendant that the evidence shows that there was no contract of employment between

the plaintiff and defendant and no promise, express or implied, by the defendant to pay for plaintiff's services. If this contention is upheld by this court, the judgment in favor of plaintiff must be reversed and it will not be necessary, in that event, to consider other points presented in the briefs filed by the defendant.

The evidence is uncontradicted that prior to March 27, 1916, the plaintiff had never seen the defendant and had had no contractual relation of any sort with her. Previous to this date her legal affairs had been intrusted to Arthur K. Wolfe, an attorney, who had been the attorney of Nancy K. Welch prior to her death. He had drawn the latter's will under which James A. T. Hill was devised one-half of her estate in his own right; the other half of the estate was devised to him in trust for a niece. Hill died shortly after the death of Nancy K. Welch. Wolfe had also acted as his attorney prior to his death, and thereafter instituted a search which resulted in discovering the defendant in this suit, whom the evidence shows is the only heir of Hill.

Wolfe thereafter acted, under a contract with defendant, as her attorney in the distribution of the Welch and Hill estates and in connection with other litigation that grew out of them. Early in 1916 the defendant resided in Michigan and on Wolfe's advice she took up her residence in Chicago so that she might legally act as the administratrix of Hill's estate. The defendant came to Chicago on March 27, 1916, and immediately went to Wolfe's office. On March 25, 1916, Wolfe sustained a fractured skull as a result of an accident and was, at the time of defendant's visit to his office, confined in a hospital.

Plaintiff on March 27, 1916, occupied an office in the same suite in which Wolfe had his office. Prior to this date, as stated, the defendant had never seen plaintiff and they never met thereafter until the time of the trial of the present suit.

The evidence shows that on the day before the appearance of defendant in Wolfe's office, the plaintiff had visited Wolfe at the hospital and was informed by him that the defendant was expected to visit Wolfe's office the following day. Wolfe at this time requested the plaintiff to do whatever was necessary for Mrs. Higgins on the occasion of her visit. Touching what occurred at the meeting between plaintiff and defendant, the plaintiff testified that he met defendant at his office on March 27, 1916, and he informed her that "Mr. Wolfe had advised me that she was coming in to see him;" that "Mr. Wolfe had been seriously injured on the Saturday before;" that he "had sustained a fracture of the skull and was confined in the hospital and would be there for a long time;" that it was Mr. Wolfe's idea that plaintiff should become a resident of this State, and that defendant had stated she had come to Chicago for that purpose; that he had prepared certain papers which she signed and swore to; that he then gave certain attention to her matters and that about the middle of July Mr. Wolfe informed him that he (Wolfe) "would not be able to look after the matters pending in the Probate court, and that I would have to go over and take care of it."

Plaintiff also testified that he told the defendant that heirs who had been disinherrited under the will of Nancy E. Welch would file a bill to set aside the will, and that defendant replied, "You will look after my interest," "and I told her I would."

With reference to her relations with plaintiff the defendant testified in substance that she and her father came to Chicago from Michigan at the suggestion of Mr. Wolfe; that she went to Wolfe's office and that -

> "While we were there Mr. Brothers went out to the hospital and saw Mr. Wolfe, and when he came back he told us that Mr. Wolfe had asked him to take care of the case for him, and so he did. That is the substance of the conversation with Mr. Brothers. I never asked Mr. Brothers in any words to look after my case. Mr. Brothers said he was going to take care of the case while Mr. Wolfe was in the hospital. I came to Chicago for the purpose of making my residence here. I stayed here from March until September. I never saw Mr. Brothers but that one time at the office when I first came to Chicago. I did not see him at any time after that until the commencement of this present trial. I received several letters from Mr. Brothers, which were offered here in evidence. I never wrote to Mr. Brothers with the exception of the one letter which was introduced in evidence."

The letter written by defendant was written to plaintiff March 19, 1917, in response to a long letter of March 16, 1917, from plaintiff. In his letter plaintiff evidently sought to impress defendant with the extent and value of the services which he had rendered her and to warn her of the manner in which Wolfe was attending to and protecting her interests. In this letter he stated:

> "As I am the only lawyer who has done anything whatever relative to the litigated matters in these estates, I beg leave to say that if you desire me to do so I will enter your appearance in the matter of the appeal by the Public Administrator and try to have the order of the Probate court sustained."

In her answer to this letter the defendant wrote:

> "Your letter of recent date was received and would say in reply that Mr. Wolfe has a contract to carry the matter through to a final settlement, and if I should instruct you to go ahead as you have suggested, Mr. Wolfe would still carry the right to come in for his 1/4 according to the contract and you would want a fee which would mean two fees instead of one, and so I would suggest that you and Mr. Wolfe handle the matter between you and for you to have your pay out of the 1/4 which in my opinion would make a good nest egg for both of you."

On March 23, 1917, the plaintiff wrote another lengthy letter to defendant, in which he definitely asserted he

intended to insist upon being paid for his services, and he stated:

> "I have no designs on your estate nor any other motive in procuring this partial distribution than to give you the immediate benefit of a part of your estate, and also to enable you or Mr. Wolfe to pay me my fee, whichever one you may agree among you should be the one to pay it."

The plaintiff testified that later he had a telephone conversation with defendant in which he said to her that he expected to look to her for compensation for his services and that she replied, "Mr. Wolfe will take the matter up with you and he has agreed to pay you out of his portion." He further testified that this ended his conferences with defendant.

Whether the plaintiff attempted to undermine the confidence which defendant had in Wolfe as her attorney, need not be discussed or determined at this time. It is perfectly clear, however, from the evidence that defendant did not employ plaintiff as her attorney. The evidence discloses that defendant promptly and definitely denied any responsibility to the plaintiff for any services he had rendered in the litigation and proceedings in which she had an interest. No express contract between the parties is disclosed by the evidence and nothing was said or done by defendant, even upon the testimony of plaintiff himself, that indicated any purpose or intention on her part to employ plaintiff. It is conceded that defendant never met plaintiff but once, and, upon plaintiff's version as to what transpired on this occasion, no contract was entered into at this time between the parties. Plaintiff admits that he met her and talked with her at this time solely at the request of Wolfe, whose unexpected illness required him to procure assistance in connection with defendant's property interests.

Plaintiff made no attempt to charge the defendant for services rendered by him until he had fallen out with Wolfe. The evidence does disclose that defendant knew that Wolfe had requested

plaintiff to assist him in the services Wolfe had agreed to render under his contract. The letters written by plaintiff to defendant and his telephone conversation with her, which contained in the main self-serving assertions, failed to elicit from defendant any statement which shows that she regarded the plaintiff as her attorney, or that she intended to employ him as such. Further than this, the evidence shows that the plaintiff delivered to Wolfe an itemized statement for services performed by plaintiff and demanded of Wolfe payment thereof.

The evidence shows that Wolfe had a contract with defendant under which she agreed to pay him a certain contingent fee for his services. There was nothing in the contract which authorized Wolfe to charge her with responsibility for services rendered by other counsel. Evans v. Mohr, 153 Ill. 561. Proof that the defendant knew of plaintiff's services was not sufficient. Price v. May et al., 132 Ill. 543.

In Chicago & Southern Traction Company v. Flaherty, 222 Ill. 67, it was held that the duty of an attorney to his client was a personal duty which could not be delegated to another, so as to bind the client, without his consent, for the latter's services.

The judgment of the Circuit court will be reversed with finding of facts.

REVERSED WITH FINDING OF FACTS.

FINDING OF FACTS.

This court finds as facts in this case that there was no contract of employment entered into between plaintiff and defendant, and that plaintiff did not at defendant's instance and request perform services or incur expenses in and about certain cases for the defendant, as described in his declaration, and defendant did not promise to pay plaintiff the reasonable value of said services, and did not promise to pay him any sum of money, as alleged in plaintiff's declaration or in any count thereof.

264 - (50)

216 I.R. 629

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293 - 25170

JOSEPH SIPARIS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM THE HIGH COURT
OF COOK COUNTY.

216 I.A. 629

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Chicago Railways Company, from a judgment of the Superior Court entered in favor of the plaintiff for the sum of $4,000.

The accident which brought about the injuries to plaintiff occurred about eight o'clock in the evening of December 10, 1910, in the vicinity of the intersection of Van Buren and Franklin streets in Chicago. The case has been tried twice before a jury and a verdict in each case was rendered in favor of the plaintiff.

It is insisted for the defendant as a sole ground for the reversal of the judgment that the verdict of the jury is contrary to the law and the evidence. A much controverted question of fact on the trial was whether the accident occurred at the east cross-walk on Franklin street at the intersection of Van Buren street, or whether it occurred on Van Buren street near the middle of the block between Franklin street and Fifth avenue, a street next east of Franklin street, as contended for by defendant. This question was properly submitted to the jury. While several witnesses testified that the accident occurred near the middle of the block, certain other witnesses for the plaintiff testified that it happened at the east cross-walk, and there are certain uncontradicted facts in the case which lend some support to the theory of plaintiff on this question. Plaintiff at the time of the accident was employed as a laborer on a building then in the course of erec-

tion on the northeast corner of Franklin and Van Buren streets. He and two other witnesses testified that their working hours on the building were from four o'clock p. m. until midnight; that the men were allowed 15 minutes about eight o'clock each evening for lunch; that it was customary for plaintiff and other men employed in the building to go to a restaurant situated on the south side of Van Buren two or three doors east of Franklin street; that on the evening in question, in accordance with this custom, plaintiff and two other workmen left the building where they were at work and started across Van Buren street to the restaurant; that as they started across the street they saw a large wagon standing lengthwise on the north side of Van Buren street with its rear end toward the west and a short distance east of the northeast corner. The plaintiff testified that as he started across the street he saw the light of a street car which was coming toward the crossing from the west; that he looked to the east and saw nothing except the wagon standing between the north curb line and the north tracks on Van Buren street; that he did not hear a bell and that as he was about to step across the north track he was struck by a westbound street car and sustained injuries.

One Bogdonis, a witness for plaintiff, testified with relation to what happened just before the accident occurred as follows:

> "When we came up out of the basement we come to go across the street. Stanley Wiwadis went in front, Joe Siparis followed him. Wiwadis went south. He got just across the tracks. The next man after Wiwadis was Joe Siparis; how far he was behind Wiwadis, why, I couldn't say, ten or six feet, or what, I couldn't say. I just got off from the sidewalk to the street. I was starting across the street, too. As I got off the sidewalk I looked one side and the other, and I saw the car with a big light coming from the west; that big light of the car coming from the west was about a block away. I didn't see anything to the east, just one wagon standing there. I couldn't say where the wagon was standing with reference to where I was, about eight or ten feet east of me and on the north side of Van Buren street.**** I seen he was hit by the car and then put him on the platform and taken away."

If it be true, as asserted by witnesses for plaintiff, that the workmen were on their way to a restaurant on the south side of Van Buren street, then no adequate reason is shown why they should have attempted to cross the street at a point a considerable distance east of the restaurant, as asserted by witnesses for the defendant.

The evidence discloses that it was dark and rainy on the night in question and witnesses for the plaintiff testified to facts which, if true, indicate that the street car which struck plaintiff was running without a headlight.

Bagdonis testified that he saw the westbound street car when it was a couple of feet from the place where it struck plaintiff, "and there was not any headlight burning on the front end of the car at that time. The car was going fast when it hit Joe Siparis."

The testimony of plaintiff's witnesses tends to show that the car had stopped when it reached about the middle of Franklin street.

Alex Macujitis, a witness for plaintiff, who was riding on the front platform of the westbound car, testified that he saw a headlight on the eastbound car, but that he did not see one on the car on which he was riding; that he boarded the car at LaSalle street and at that time it had no headlight. Plaintiff testified that as he attempted to cross the tracks he looked east and did not see the westbound car.

While the defendant did introduce some testimony, that of the conductor and motorman on the car, to the effect that the car bore a headlight at the time of the accident, this evidence on the point is not by any means conclusive.

Even though it be true, as contended, that the car was lighted on the inside and that the lighting equipment, when in proper condition, required that the headlight should be burning at

all times when the inside lights were turned on, this does not exclude the possibility that the equipment on the night in question was not in proper working condition.

When due consideration is given to the uncontradicted testimony that the plaintiff and other workmen were on their way to a restaurant on the south side of Van Buren street, a short distance east of Franklin street; that the night was dark and rainy; that the vision of plaintiff was in some measure obstructed by the wagon standing on the north side of Van Buren street; that evidence was admitted tending to prove that the car was running at a high rate of speed and that it bore no headlight, we are not authorized, to as a matter of law, to say that the conclusions arrived at by the jury were incorrect.

In the case of Chicago City Ry. Co. v. Tennimore, 199 Ill. 9, the Supreme court said:

> "Anticipation of negligence in others is not a duty which the law imposes. On the contrary, it is a presumption of law that every person will perform the duty enjoined by law or imposed by contract. Where, for instance, the traveler knows that the law requires a railroad company to ring a bell, or sound a whistle, he has a right to rely upon the performance of such duty by the company. (2 Jaggard on Torts, 970; Shearman & Redfield on Negligence, Sec. 92; St. Louis, Vandalia and Terre Haute Railroad Co. v. Dunn, 78 Ill. 197; Chicago, Burlington & Quincy Railroad Co. v. Gunderson, 174 id. 495; Thomas v. Railway Co., 8 Fed. Rep. 732). In the case at bar appellant owed it, as a duty to appellee and to the public generally to equip its trains with proper headlights. When appellee started to cross the street she had a right to assume that the appellant would perform his duty, and had a right to rely upon the belief that no train would approach without a proper headlight. If she saw no headlight she had a right to assume that no train was approaching."

The judgment of the Superior court is affirmed.

AFFIRMED.

317 - 25195

JOHN S. ELIZINOWSKI,
Appellee,

vs.

ALBERT SIKORSKI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

216 I.A. 630

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant seeks by this appeal to reverse a judgment in the Municipal court in favor of plaintiff for the sum of $465.

The plaintiff is an architect and his claim against the defendant is for money due for personal services rendered defendant. The defenses set up by the defendant were, in substance, that, excepting as to one charge item, none of the items in the statement for services rendered was for services performed at the request of the defendant, and that as to all the items in said statement, except one, the plaintiff never made or intended to make any claim therefor against the defendant; that the charges made were grossly excessive and that all just and legal claims of plaintiff against the defendant had been duly paid by defendant, which fact was evidenced by checks introduced in evidence.

It is urged by defendant that the verdict and judgment are contrary to the manifest weight of the evidence. Whether in fact the plaintiff had rendered the services for defendant and whether the charges made therefor were excessive, were questions of fact for the determination of the jury. The evidence introduced on the material questions of fact was conflicting. Some evidence was introduced in favor of the contention of the plaintiff that the services were performed at the express request of the defendant, and while there is reason to believe that the charges made for certain

of these services were excessive, we are unable to say that the verdict of the jury and judgment of the trial court on the controverted question of fact were erroneous. The claim of plaintiff was for $465; this amount was reduced by the verdict of the jury to $350.

There does not appear in the record any serious contention that the services sued for were not in fact performed. The assertion of defendant is that he and plaintiff had been friends for many years. It was the practice of each of the parties to endeavor to procure business for the other, and while we are inclined to the view that the evidence does show that the personal and business relations between the parties were intimate, this fact in and of itself was not sufficient to warrant the belief, evidently entertained by the defendant, that the services rendered by the plaintiff were performed gratuitously. I. C. R. R. Co. v. Gillis, 66 Ill. 317; Welch v. C. & A. Ry. Co., 195 Ill. App. 146.

It is claimed that the court erred in giving instructions to the jury. The abstract of record filed herein does not disclose what instructions were in fact given to the jury. The abstract recites, "whereupon the court gave, among others, the following instructions." We are therefore not apprised as to what instructions were given to the jury, and such being the case we are unable to determine whether the jury were properly instructed.

It is conceivable that instructions might have been given to the jury which would have cured the alleged defects in the instructions complained of. There is also merit in the contention made by counsel for plaintiff that the record fails to disclose upon whose request the instructions complained of were given to the jury. If, as a matter of fact, these instructions were given at the request of the defendant he would not be permitted in this court to complain of such action on the part of the trial judge. Boyd v. Schnell, 209 Ill. App. 187.

Further, an examination of the record discloses that

defendant's counsel objected to the giving of the instructions, but he failed when so doing to point out specifically his reasons for his objections. The record shows that "the defendant, by his counsel, then and there excepted without pointing out to the court any specific ground of objection or exception." The record does not disclose that defendant's counsel was not given an opportunity to point out such specific objections, if any, as he might have urged to the giving of the instructions. He will not be permitted then to present those objections for the first time to this court. Chicago v. Everleigh, 162 Ill. App. 623.

However, it is our opinion that one of the instructions, the fifth, expresses a correct principle of law applicable to the facts of the case. As to the other instruction, the sixth, the plaintiff did testify that certain checks payable "in full" were given in connection with matters not involved in the present controversy.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

326 - 25204

THE ATLANTIC TRANSPORT COMPANY, a corp.,
Appellee,

vs.

GEORGE B. CARY,
Appellant.

216 I.A. 630

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Atlantic Transport Company for many years was engaged in the business of shipping goods between American and foreign ports, a part of which business was conducted between Baltimore, Md., and Belfast, Ireland. In providing for the transportation of goods for its customers the plaintiff sometimes employed vessels owned by itself and at other times it engaged space in vessels owned by others. It was customary for the plaintiff to enter into contracts with shippers for the carriage of goods and freight between Baltimore and Belfast, under which the plaintiff was required to provide the vessels for this service.

In the conduct of its business between the named ports it was plaintiff's custom to deliver its shipments to what is known as the "Lord Line." This name does not indicate a corporation or company owning and operating a line of steamships, but is indicative of "a service." The steamships which carried shipments contracted for by plaintiff were generally under different ownerships; certain contracts made by plaintiff with shippers designated "the service" which plaintiff would engage to carry such shipments; the service between Baltimore, Md., and Belfast and Dublin, Ireland, is known as the "Lord Line"; that between Baltimore and London as the

"Atlantic Transport Line," and the service between Baltimore and Antwerp is the "Red Star Line." The plaintiff in contracting for "Lord Line" service used the vessels of different owners. The steamers Lord Charlemont and Lord Ormond were owned by the Irish Ship Owners Company.

On May 13, 1916, the defendant made inquiry of an authorized agent of plaintiff whether defendant could procure vessel space for 500 tons of glucose for shipment to Belfast, and he was informed that such space was available for a stated rate. Following this a contract in writing was prepared by plaintiff and mailed to defendant. The material part of this contract as modified on June 7, 1916, is as follows:

"Freight Contract No. 944 Corrected.

Chicago, June 7, 1916.

Mr. George B. Cary,
Webster Building,
Chicago, Ill.

By your authority and subject to the conditions written, stamped and printed hereon, we have to-day made contract between you and Lord Line for shipment via Baltimore to Belfast, Ireland, as follows:

PROPERTY	RATE	SHIPPER
500 tons glucose in barrels. Shipper's optinn of applying starch, oilcake &/or oatmeal in sacks.	$1.25 per 100 lbs.	

Subject to the clause appearing on reverse side.
100 tons for S. S. "Lord Charlemont" appointed to sail about June 20th.
400 tons for S. S. "Lord Ormonde" appointed to sail late July. * * *
Important -- Send clear copies of Bill of Lading showing above contract numbers, on the day of issue to J. D. Roth, G. W. F. A. 327 So. LaSalle St., Chicago.

J. D. Roth,
GENERAL WESTERN FREIGHT AGENT,
Per A. J. Swanson."

J. D. Roth, named in the contract, was the general western freight agent of plaintiff and not of Lord Line, which was not, as stated, a legal entity.

While there are some expressions in the contract and in the testimony of McAllister, a witness for plaintiff, that lend support to the argument that plaintiff was acting merely as an agent in the transaction, we are convinced from an examination of the whole record that the plaintiff dealt with the defendant as a principal and that the contract, however ambiguous in identifying the parties thereto, was in fact, to the knowledge of everybody concerned, entered into by plaintiff and defendant. The evidence discloses that the defendant had for some years done business with the western agent of the plaintiff and it is a fair inference derived from the evidence that he knew of the nature of the business conducted by defendant and the methods employed by it in conducting this business.

The defendant accepted the contract under which he agreed to deliver 100 tons of glucose for shipment on Lord Charlemont, which was "appointed to sail about June 20th." The evidence shows that the steamship Lord Charlemont arrived in the port of Baltimore on June 17, 1916, and departed therefrom for Belfast on June 24, 1916; that during all this time the plaintiff was ready and able to comply with the terms of the contract and that defendant was aware of this fact; that defendant failed and neglected to make delivery of the shipment to the plaintiff; that plaintiff had reserved in the Lord Charlemont the necessary space for the shipment, and that plaintiff was unable before the departure of the vessel for Belfast to procure other cargo for the space contracted for by defendant. The shipment which was not delivered in time for shipment on Lord Charlemont was subsequently delivered to plaintiff and shipped to Belfast on another vessel. The evidence shows that the loss to plaintiff by reason of defendant's breach of the contract was $2,720. The case was tried in the Municipal Court of Chicago by the court without a jury and judgment was entered

therein in favor of the plaintiff for this amount. The defendant brings the case here by appeal for review.

It is insisted that the contract was not made with plaintiff, but with "Lord Line" and that plaintiff had no interest in the contract or its performance other than as an agent. We do not agree with this contention. The original contract made on May 13, 1916, and known as #944, was modified on June 7, 1916, at the request of defendant so that the contract between the parties became as shown above. The defendant did not formally sign either of the contracts, but that he did accept them and that the plaintiff acted upon this acceptance there can be no doubt at all under the evidence.

The defendant testified that in a conversation with the agent for plaintiff he was informed by him that "Lord Line" had the vessel space desired by defendant and that this agent named the rate for the shipment which he, defendant, accepted. The original contract provided for the shipment of 500 tons of material and at the request of defendant it was no modified that 400 tons of the material was to be shipped at a later date.

The testimony, documents and correspondence introduced in evidence touching the controversy between the parties are too voluminous to indicate in this opinion. We are convinced, however, that the plaintiff in good faith was at all times ready to comply with the terms of the contract and that defendant's liability thereunder is a consequence of his failure to comply with its terms. The uncontradicted testimony is to the effect that the term "Lord Line" is merely indicative of a kind of service between the two ports. There was no such person or entity in existence as "Lord Line" and the defendant admitted on the trial that he knew that he was dealing with someone

connected with the Atlantic Transport Company. At the time of the breach of the contract the plaintiff had executed it so far as it was possible for it to do so and it gave timely warning to defendant that it would be impossible to delay the shipment, as requested by defendant, owing to the fact that it would be impossible to procure other cargo for the space required by and set aside for the defendant. The evidence shows that the defendant never attempted, even after this breach of the contract, to set aside or abrogate the contract, as he continued thereafter to deal with the plaintiff on the assumption that it remained in full force. He cannot, therefore, be permitted to rescind the contract in one part and affirm it as to another.

If it be assumed that the defendant in the making of the contract dealt with an agent who was acting for an undisclosed principal, this fact would not relieve the defendant of liability under the contract. A contract made by an agent on behalf of an undisclosed principal may be the basis of an action by either the undisclosed principal or the agent. Saladin v. Mitchell, 45 Ill. 79.

In Sellers v. Greer, 172 Ill. 552, the Supreme Court said:

> "It will be observed that appellee did not sign the contract, and hence it is contended that the contract is not mutual. It appears, however, that the contract was delivered by Morris Sellers appellant, to appellee, on the day it was executed, andappellee accepted the contract and agreed to its terms and conditions. The acceptance of the contract by appellee assenting to its terms, holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on his part, as held by this court in Johnson v. Dodge, 17 Ill. 433, and Vogel v. Pekoc, 157 id. 339."

So here, the lack of a formal execution of the contract by the party plaintiff does not preclude him from a recovery thereon.

The contract bore certain endorsements, among which is the following:

> "This contract is made subject to conditions of act of Congress, etc., including attached war clause, and is further conditioned upon the continuance of the Steamship Company's service in the sailing of its steamers," etc.

Neither this nor other provisions endorsed thereon, under the circumstances of the case, gave the defendant the right to abrogate the contract. The above and other conditions in the contract permitted a cancellation of it on the happening of certain, definitely expressed, events. We think, when the contract is interpreted in the light of the business of the parties and of the time when it was entered into, it cannot be said that the plaintiff could arbitrarily "for any reason" refuse to perform the service required by the contract. Construing the provision quoted with another provision of the contract, which is as follows:

> "if at any time in the judgment of the Steamship Company conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, the sailing of such vessel or vessels may be postponed or cancelled."

we are of the opinion that the contract was not rendered unenforceable by reason of these provisions and conditions.

In deciding the case of the Kronprinzessin Cecilie vs. Guaranty Trust Co., 244 U. S. 12, Mr. Justice Holmes said:

> "It follows, in our opinion, that the document (contract of shipment) is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs."

A contract which contains a stipulation excusing a party thereto from absolute performance in case of an emergency is not thereby rendered void for lack of mutuality. 13 Corpus Juris, 337 - (187).

Reversible error was not committed by the trial judge in his rulings on the admission of evidence. Whatever doubt we may entertain as to the admissibility of a certain document objected to, the error in admitting it, was harmless; there can be no doubt on the whole evidence that the judgment of the trial court was correct.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

338 - 25217

MARIE PITUSIAK,
Appellee,

vs.

GLOBE MUTUAL LIFE INSURANCE ASSOCIATION, a corporation,
Appellant.

216 I.A. 630

APPEAL FROM COUNTY COURT OF COOK COUNTY.

MR. JUSTICE DRIVER DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action on an insurance policy issued by defendant to her husband, John Pitusiak, on November 29, 1915. Insured died May 21, 1917.

A defense set up by plea to the action on the policy was that by its terms the policy did not take effect if before its date the applicant had been rejected for insurance by any other company, association or society; that insured had been rejected by the People's Life Insurance Company of Chicago before the date of the policy, and that the policy here sued on never took effect.

Other questions argued in the briefs of counsel which arise under other pleas filed in the cause need not be discussed in this opinion for the reason that we are convinced that the plea above referred to sets up a good defense to the action brought by plaintiff and that this defense was proved by the uncontradicted evidence in the case.

The second page of the policy introduced in evidence contains the following provision:

> "This policy shall not take effect if the insured die before the date hereof, or if on said date the insured is not in sound health or if before its date the insured has been rejected by any other company, association or society."

And on the third page thereof appears this statement:

"All statements made by the insured in the application shall, in the absence of fraud, be deemed representations and not warranties."

The evidence introduced on the trial shows that the application made to defendant by insured for insurance was received by it November 23, 1915. This was a preliminary application made through one of defendant's agents. On November 29, 1915, Dr. T. J. Allen, medical examiner for defendant, examined insured and on the application appears the following question and answer:

"Q. Were you ever rejected for insurance in any company, association, society or lodge, or did you ever apply when the policy was not issued?"

A. No."

In this, the regular application, the insured agreed that the answers made by him therein were "material to risks, and any untrue or false statement or answers made to the examining physician, agent, or other person, shall make the policy null and void." In the preliminary application made by insured he was asked the question, "Have you ever been rejected or postponed by this or any other company?" and to this question he answered, "No." The applications were signed by the insured; a policy was issued theron which provided, as stated, that if before its date the insured had been rejected by any other company, association or society, the policy was to be void.

Dr. Rachel H. Carr testified that she was Medical Director for the People's Life Insurance Company; that the insured, Pitusiak, made application to that company for insurance and was examined therefor by Dr. Frank J. Jirka, medical examiner for the company. The application for this insurance was introduced in evidence and the following statement thereon was identified by the witness as being in her handwriting:

"Rejected Nov. 4, 1915, on account of unsatisfactory right lung & Further information - hypertrophy of heart."

One Lutterloh, assistant secretary of People's Life Insurance Company, identified the application made by insured for insurance in that company and he testified that the application was rejected by the company on November 4, 1915, and that no policy was ever issued to Pitusiak.

It was admitted on the trial that Dr. Jirka would testify that on November 3, 1915, he examined insured for insurance in the People's Life Insurance Company; that the application for this insurance was written on a blank form of that company and filled out in the handwriting of Dr. Jirka; that he inserted the answers of insured as given to him by Pitusiak, and that this application was signed by John Pitusiak, the insured, on the 3rd day of November, 1915. The uncontradicted evidence therefore shows that John Pitusiak was rejected for insurance by the People's Life Insurance Company twenty days before his application for insurance in defendant company was received by it and 26 days before the policy was issued to him.

Counsel for defendant have aided us by the citation of a long list of authorities in support of their contention that the policy under the uncontradicted evidence in the case was void, and it is our view that whether the statements made by insured are to be regarded as representations or warranties their proved falsity renders the policy void.

In Karaff v. Supreme Court, I. O. O. F., 159 Ill. App. 496, it is said:

> "If the answers as to the other applications and rejections which were clearly false, were only representations, they were so highly material toward a determination by the company as to whether it would accept the risk that their falsity even if not fraudulent and even without the express agreement to that effect would render the certificate null and void, but in our judgment their correctness was clearly and expressly warranted in the document which by the express terms thereof and of the certificate formed a part of the contract between the parties, their falsity for this reason was a complete defense to this action."

In Peterson v. Manhattan Life Insurance Company, 115 Ill. App. 421, the application contained the question, "Have you ever been declined or postponed for any insurance?" to which the applicant answered, "No," which answer was false. In discussing the question whether this answer constituted a warranty the court said:

> "Even if it were not a warranty but merely a representation, it was material and if it had been answered truly would probably have led to such an investigation as would have caused defendant to reject this application."

The judgment of the Appellate court in this case was reversed by the Supreme Court (see 244 Ill. 329), but on the ground that the question was not broad enough to include fraternal beneficiary societies. The Supreme court decision does not question the soundness of the holding of the Appellate court that a false statement of the kind under consideration was material to the risks and should have been answered truthfully.

In Ebner v. Ohio, etc., Co., 121 N. E. 315 (Ind.) the court said:

> "Knowing that he had made the application, he was bound to know that it had either been rejected or that it was pending, and, if pending, his answer was likewise false. * * * * * "

In Fletcher v. Bankers Life I. Co., 119 N.Y. S. 801, the applicant stated that he had applied for and had not been rejected for life insurance, and the court said:

> "Assuming that applicant had been told he was postponed for another examination, the deceased knew at the time he was examined that he had made an application to the Mut. Res. L. I. Co., and that a policy had not been issued. His answer was clearly untrue. His rejection by another company was most material. This was a clear breach of warranty."

Plaintiff is not aided by the assertion in that the evidence fails to disclose that the insured knew of his rejection for insurance by the People's Life Insurance Company that the policy would not because of such rejection become void. Peterson v. Man-

hattan Life Insurance Company, 244 Ill. 229.

There can be no doubt under the evidence that the insured knew that he made application for insurance some weeks before the policy in question was issued to him and he must be held to have understood that good faith, in the absence of knowledge on his part that he had been rejected, would require him to disclose to defendant the fact of the application. In the ordinary case, where the representation is that an applicant has been in good health prior to the making of an application for insurance, it is highly important that the insurer should be apprised of any fact within the knowledge of the applicant which would tend to aid the insurer in determining the truth of such statement. Good faith and fair dealing would require of such applicant that he truthfully state whether he had applied for insurance to or had been rejected by other insurers. And this is so, as held by numerous authorities, wcether such statem nts be regarded as representations or warranties.

However, the policy in the present case contained a provision that the policy was to be void if the insurer had applied for insurance and had been rejected by another insurer. This provision of the policy is not in all respects similar to a warranty or a representation. It constituted an express unqualified agreement that the policy was to be void if in fact the insured had so applied to or had been rejected by another insurer. Whether this provision of the contract may be said to constitute a condition precedent to the right of recovery under the policy, that is, whether it be held that the contract between the parties never went into effect, or whether the provision be regarded as a warranty or a representation, the plaintiff, in any event, cannot recover. Chambers v. M. W. L. I. Ass'n, 64 Minn. 195.

There is no merit in the contention that the defense was waived by defendant for failure to file a sufficient affidavit of

merits. The affidavit is clearly defective, but the parties treated it as sufficient at the trial. No motion was made to strike it from the files and the parties proceeded to trial as though the affidavit were sufficient and the pleadings settled in the cause. Under the circumstances, the objection to the affidavit came too late. Redding v. Looney, 20[illegible] Ill. App. 413.

Whatever the deficiencies of this affidavit, they could have been remedied by calling, in some manner, the attention of the trial court thereto.

In view of what has been said above it was error for the court to instruct the jury that they might take into consideration whether the insured knew of his rejection for insurance by another company.

A much disputed question of fact as to whether an officer of the defendant added a provision to the contract by the use of a rubber stamp after the death of the insured, need not be determined here. This question in any event was for the jury, as there was a direct contradiction in the evidence with respect to it.

The judgment of the County court will be reversed and judgment of nil capiat entered here in favor of the defendant.

REVERSED AND JUDGMENT OF

NIL CAPIAT HERE.

350 - 25229

SAMUEL GALLICK,
Appellee,

vs.

M. A. RIMAN,
Appellant.

216 I.A. 630

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action in the Municipal Court of Chicago to recover of defendant the sum of $600. Judgment was entered in favor of plaintiff and defendant brings the case here by appeal.

In his statement of claim the plaintiff alleged that defendant was indebted to him in the sum of $600, which amount the defendant had obtained from plaintiff by falsely representing to plaintiff that he, defendant, was entitled to retain this sum out of a check of Missouri State Life Insurance Company for $5,007, which was drawn by the company in payment of an amount due plaintiff under certain life insurance policies on the life of Henry Gallick, plaintiff's brother, in which policies plaintiff was named as beneficiary.

In the affidavit of merits filed by defendant it is alleged that the defendant is not indebted to plaintiff in any sum whatsoever; that whatever sums were paid to plaintiff by defendant were voluntary payments for services rendered by defendant.

The evidence introduced on the trial was in direct conflict concerning the circumstances attending, and the reasons for, the payment to defendant of the sum of $600. Riman, the defendant, testified that he was a vulcanizer and tire repairer; that he had no office; that prior to April

2, 1917, he was a special agent for the Missouri State Life Insurance Company; that he transacted business for the company with its Chicago manager, W. J. Lake; that he did not know why he was paid the $600. Briefly, the defendant's position here is that he and plaintiff had entered into a conspiracy for the purpose of fraudulently procuring insurance on the life of Henry Gallick, deceased, whom the evidence shows had at different times, both before and after the policies were issued, attempted to commit suicide; that the $600 was paid to defendant in pursuance of an immoral and illegal agreement. The plaintiff denied that he had entered into any conspiracy with the defendant and it is shown by the evidence that when the policies in question were first issued the insured named his, insured's estate, as beneficiary therein; that sometime thereafter plaintiff was substituted in the policies as beneficiary.

An examination of the record convinces us that the trial court was fully authorized by the evidence to disregard the testimony of the defendant. The position of the defendant is that as a result of the conspiracy he received of plaintiff the sum of $600. It is not easy to understand, under such circumstances, why defendant demanded from plaintiff so modest a sum. If he is as immoral as he confesses himself to be it is hard to believe that he would be satisfied with such a small share of the plunder. His testimony is unbelievable for other reasons; it is directly contradicted in main particulars by the plaintiff and by W. J. Lake, Manager of the Mutual Life Insurance Company, as also by Wm. H. Holmes, Assistant Cashier for the Chicago Union Bank. The evidence shows that the $600 was paid to defendant at the Chicago Union Bank on April 2, 1917. Defendant testified "I received $600 through W. J. Lake that had belonged to Sam Gallick. He gave me a slip and a bank

deposit to my name." Referring to the check for $5,007 defendant testified he turned this check back to Lake on April 2, 1917, and "a deposit of $600 was made to my credit in the Union Bank of Chicago. I know who made that deposit; it was W. J. Lake. * * * I do not know what the $600 was for."

The evidence shows that the plaintiff and his wife met defendant at the bank on April 2, 1917; that defendant had, two or three days prior thereto, demanded $600 of plaintiff before he, defendant, would turn over the $5,007 check to plaintiff; that plaintiff vigorously protested against making this payment and refused to pay any money to the defendant; that at the meeting at the bank between the parties a violent discussion arose as to this payment; that Mrs. Gallick attempted to wrest the check from Riman's hands and that Gallick, the plaintiff, was forced by the persistent conduct of Riman to turn over to him $600. W. J. Lake directly contradicted the testimony of the defendant as to the payment of $600; he denied that he delivered a deposit slip to Riman or that he deposited any money to Riman's credit in the bank. Holmes testified that the slip was written by him, the witness; that it was in his handwriting.

The evidence shows almost conclusively that Riman, in direct denial of his duty as agent for the insurance company, refused to turn over the check which belonged to the plaintiff and that by conduct which amounted to duress he compelled the plaintiff to pay him the sum of $600.

The judgment of the Municipal Court should be and it is affirmed.

AFFIRMED.

203 - 25079

PEOPLE OF THE STATE OF ILLINOIS
ex rel. SAMUEL I. THRASHER,
Appellee,

vs.

MAX FISHER,
Appellant.

216 I.A. 630

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree entered against him as the owner of premises numbered 205 South Halsted street, Chicago, restraining their use in violation of certain sections of an act entitled, "An act regarding places used for purposes of lewdness, assignation, or prostitution, to declare the same to be public nuisances, and to provide for the more effectual suppression thereof," (Session Laws of 1915, p. 371), and enjoining their use for any purpose for the period of one year.

The premises involved were used as a hotel, the floors above the first being bedrooms and the first floor used as a restaurant. The gravamen of the charge in the bill is that the premises were used for the purposes of lewdness, assignation and prostitution, and consequently constituted a nuisance within the meaning of the act supra.

In determining the questions of fact before us we shall assume that the court heeded only evidence pertinent and unobjectionable from a legal standpoint, and in our review of such evidence we shall include the evidence proffered by defendant but rejected by the Chancellor, as the same appears from the statements made by counsel when objecting to the Chancellor's ruling.

We think the admissible evidence proffered by defendant, both that heard and that excluded, abundantly sustains the essential averments of the bill (excepting as to the restaurant

floor.) The very nature of the evidence of defendant is self-convicting. He knew the illicit use made of the bedrooms and their nightly occupation by women of the street who lured their male escorts to defendant's "hotel" for immoral and lewd practices. He knew that the female habitues of his place were prostitutes, and his alleged words of caution to his employees not to admit to the place women unaccompanied, and only those of assured respectability who came accompanied by a male escort, betrays knowledge by defendant of the immoral practices which these transient men and women guests were accustomed to indulge in, in the bedrooms of his hotel, and that such was the purpose intended when they were engaged. His contention that he was always anxious to conduct the establishment as a respectable place is not at all convincing in the light of the strong testimony in the record that the bedrooms of the hotel were continually used for lewd purposes and that lewdness was there uniformly practiced. Furthermore, defendant's duty was not discharged by an attempt to prevent the illicit practices indulged upon his premises, because the proofs demonstrate that such immoral practices were not simply occasional but continuous and that moral occupation was the exception and immoral the rule.

This conclusion in no way conflicts with the holding in People v. Smith, 275 Ill. 286, that "an effort in good faith to abate the nuisance will prevent a decree to close the place," because from the Chancellor's finding we must assume that he did not believe the effort made, if any, to abate the nuisance was made in good faith or at all. We are inclined to take this view of the situation from all the facts and circumstances appearing in the record.

The notice required by Sec. 2 of the act supra to be served on the owner of premises where a nuisance of the character

set forth in the bill is carried on, is said to be insufficient and not in compliance with the act, in that the premises where the nuisance exists is not accurately set forth or the character od such nuisance sufficiently defined.

We find no merit in this contention. The form of notice used is the same as the one approved by this court in People v. Blumenberg, 202 Ill. App. 63.

Sec. 5 of the act supra provides that "nothing in this act contained shall authorize any relief respecting any other apartment than that in which such a nuisance exists." This section, we think, under the proofs clearly precludes the inclusion in the decree of the restaurant on the first floor of the premises in question. No lewdness or prostitution of any character was practiced in this restaurant so far as the proofs show. Sec. 5 supra was undoubtedly intended to meet a situation comparable to the one presented in this case. The moral part of the establishment is not to be condemned with the immoral part. In the restaurant there was no nuisance to be abated. It is in evidence, without contradiction, that a large trade with the business people of the neighborhood was transacted in this restaurant, particularly at the midday. In this part of the premises there was no evidence of immoral prac ices. There gastronomical appetites only were appeased, not sexual appetites gratified. The latter practices were confined to the bedrooms on the several floors above the restaurant. It was therefore, in our judgment, error to include the restaurant in the injunctional decree.

The decree also provided that the defendant be perpetually enjoined from maintaining any such nuisance within the jurisdiction of the court. This was in accord with the prayer of

the bill, and in terms restrains defendant from maintaining any such nuisance within Cook County on any premises or place within such limits. People v. King, 289 Ill. 462, is authority sustaining this part of the decree. For a transgression of it defendant may be punished as for a contempt of court by imprisonment in the county jail, as was done in the King case supra.

For these reasons the decree of the Circuit court is reversed and the cause is remanded with directions to that court to enter a decree in substance such as the one in the record, eliminating therefrom the restaurant portion of the premises.

REVERSED AND REMANDED
WITH DIRECTIONS.

242 - 25119

ALBERT DALLEMAND & COMPANY,
a corporation,
Appellee,

vs.

RUDOLPH LEDERER and SAMUEL
LEDERER, trading as LEDERER
BROS.,
Appellants.

216 I.A. 631

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment against them in favor of plaintiff for $583.59 rendered on a trial before the court without a jury.

It is strenuously insisted that the judgment is not only against the weight of the evidence, but that plaintiff failed to sustain its claim by that preponderance of the evidence which the law requires as a sine qua non to a recovery.

Defendants purchased of plaintiff 5835.91 gallons of "Fairlawn" whiskey, defendants say at $1.95 a gallon and plaintiff says at $2.05 a gallon. Defendants paid for the whiskey at the $1.95 rate and this action is for the additional ten cents per gallon.

There is evidence on each side of the case which would, standing by itself, support a finding for either party. It would serve no useful purpose to set forth these dual contentions. It is patent that the evidence on one side or the other is in its controlling feature - the price to be paid for the whiskey - untrue. The cause was submitted to the court for trial. The trial Judge saw the witnesses, a privilege not open to the court; consequently he was in a position to observe their manner and conduct and from such observation to judge of the credibility,

fairness, candor, intelligence or lack of these qualities in the several witnesses and therefrom to determine which witnesses were the most worthy of belief and to give credit accordingly.

Preponderance of evidence cannot always be determined from the number of unimpeached witnesses testifying on one side or the other of a particular case. Preponderance may rest in the testimony of the minority in number of witnesses, if the court or jury believe such minority to be more credible and worthy of belief than the greater number of witnesses testifying for the opposite party. Preponderance of evidence arises from the greater weight of credible evidence, which by such weight convinces the mind of its reliability and verity; so in the instant case a majority of the court agree with the trial Judge as to where the preponderance of the evidence rests. Such a judgment a court of review should be reluctant to disturb, for as said in Treloar v. Hamilton, 225 Ill. 102:

> "We have examined the testimony and find it very conflicting upon the material questions of fact in controversy, but we cannot say that its weight is clearly and palpably against the decree of the court. Unless we could say so we would not be justified in reversing the judgment and decree."

While some minor errors are found in the record in the court's rulings on the admission of evidence, they were favorable to defendants and therefore do not affect the conclusion at which we have arrived.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Mr. Presiding Justice McSurely dissents.

288 - 25165

EDWARD KLONOWSKI, a minor,
by next friend, etc.,
Appellee,

vs.

CHICAGO AND INTERURBAN TRACTION
COMPANY, a corporation,
Appellant.

216 I.A. 631

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries plaintiff had judgment on the verdict of a jury for $10,000, and defendant brings the record here for review.

Defendant argues for reversal the failure of the court to direct a verdict for the defendant at the close of all the evidence, that the preponderating weight of the evidence inhibits a recovery by defendant, and improper argument of plaintiff's counsel to the jury in his closing argument.

As no questions arise upon the pleadings, we will neither set them out nor discuss them. The liability, however, is predicated upon defendant's negligent and improper management of its car at the time plaintiff was injured. When defendant moved for an instructed verdict the condition of the record presented questions of fact proper to be submitted to the jury.

The accident occurred in the City of Blue Island, an urban community adjoining Chicago to the south, on its principal north and south business street, known as Western avenue. The place of the accident was about three blocks south of the principal east and west street in Blue Island, the business section of Western avenue extending north and south of the place of the accident. In the vicinity of the place of the accident is a canal, across which a new bridge had for some time been in process of construction and was not then fully completed. The roadway was in a disturbed condition

in many places. During the construction of the new bridge across the canal defendent had operated some of its cars over a temporary bridge which connected Western avenue north and south of the canal. This temporary bridge was used generally for all sorts of vehicular traffic.

Plaintiff worked as a mechanic at West Pullman and was accustomed to pass over the temporary bridge two or three times a week in the evening after his work, but for several days before the accident he had not passed that way, during which time defendant commenced operating some of its cars over the new bridge, of which fact neither plaintiff nor his companion of that evening had any knowledge, both testifying that they supposed the cars were still being operated over the temporary bridge.

It is conceded that the night of the accident was stormy, that the wind blew strongly, with sleet, and that everything was saturated with moisture. The car which struck plaintiff came from the southeast over the new bridge, whereas on previous occasions when plaintiff was in Blue Island the cars came over the temporary bridge from the southwest. At the time of the accident there were a number of flaring torches between plaintiff and the approaching car, and it is contended that the headlight of the car was burning dimly and was rendered obscure to pedestrians crossing its path by the brightness of the light from the torches.

Defendant claims that the point where plaintiff was struck by the car was not a crossing for pedestrians. Be this as it may, it is fairly inferable from the evidence as to environing conditions that therpath taken by plaintiff was as near to the usual crossing as the disturbed condition of the roadway at and around that crossing made possible.

In determining whether plaintiff was in the exercise of due care for his own safety at the time of and immediately

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preceding the accident, the jury had a right to take into consideration all the environing conditions as shown by the evidence - the fact that the night was dark and stormy; that pedestrians were thereby (if they in fact were) handicapped somewhat in making their way across the street; that plaintiff did not know of the changed routing of the cars from the temporary to the permanent bridge; they might in this connection also consider the dim headlight on the car and the flaring torches between plaintiff and the approaching car, and their effect in preventing (if they did) plaintiff from discovering the approach of the car in sufficient time to escape contact with it. There is evidence in this record on the part of plaintiff which, if given credence by the jury, justified their conclusion that plaintiff was in the exercise of ordinary care for his own safety at the time of and immediately preceding the accident. As said in Sorenson v. I. C. R. Co., 155 Ill. App. 606:

> "What is due care depends upon environing conditions and sometimes involves custom and knowledge actual or attributable to one or the other of the parties. Therefore in the instant case it was for the jury, in determining the question of due care on the part of plaintiff to take into consideration his knowledge of defendant's custom in operating its trains upon certain tracks, and whether in relying thereon he was injured, or that in failing to take other precautions for his safety negligence was imputable to him. With these facts in mind and the further undisputed fact that defendant did not warn plaintiff of the change in running its trains to the north on the southbound track, the court could not say as a matter of law that plaintiff was not in the exercise of due care."

If the jury believed, as they indicate by their verdict they did, that the presence of the torches was not sufficient to excuse the motorman's failure to discover plaintiff, then the motorman was guilty of negligence in not warning plaintiff by ringing the bell or otherwise notifying him of the approach of the car, and the jury was justified in so finding.

We think the jury was warranted in concluding that it was the duty of the motorman, in the condition of the roadway, to anticipate that pedestrians might be crossing at the place where

plaintiff crossed, and therefore, in the exercise of diligence the law required him to be on the lookout for them, and that his failure in this regard was negligence. (C. C. Ry. Co. v. Duchy, 196 Ill. 410.) Whether or not the spot where plaintiff crossed was ordinarily the usual crossing place, the disturbed condition of the roadway, knowledge of which is imputable to defendant, required the car to be operated with extreme care and caution to avoid running against pedestrians who might reasonably be expected to cross at that point. C. C. Ry. Co. v. Pennimore, 199 ibid 9.

Serious complaint is made regarding statements of plaintiff's counsel in his closing argument to the jury, the most serious of which is the following, which we find quoted in defendant's brief:

> "He is a cripple and he can't answer his country's call either; and that is something. At this very time when the country called, he couldn't answer, he couldn't answer."

It is urged that this statement was entirely unwarranted and was not only calculated to but did inflame the jury against defendant to its injury, and that such conduct on the part of plaintiff's counsel is error calling for a reversal of the judgment.

We can hardly agree with this contention, for was not this statement one of fact patent to every juror? Did not the jurors observe, at least when plaintiff was on the witness stand, that he was minus the limb which he testified he lost as a result of the accident attributed to the negligence of defendant's motorman? And was it not common knowledge that one who is minus either of his limbs is disqualified for active military service? Further, the record shows that plaintiff was of military age from the time this country entered the war until its glorious ending in victory for the arms of this country and the countries with which it was allied.

Moreover, we do not think the amount of the verdict

and judgment is more than compensatory for plaintiff's injuries aside from any sentimental or patriotic consideration. As a matter of fact defendant does not seriously contend that the award of damages is excessive. It was in accord with precedent that plaintiff's counsel should discuss the question of damages in his closing argument to the jury, for his natural objective was the award of adequate damages for his client's injuries, and as the record is silent as to what argument, if any, counsel for defendant made on the question of damages, we do not think it does violence to precedent to assume that the argument of counsel for plaintiff on the question of damages in closing his case may have been in answer to some discussion by defendant's counsel of that question, and whether or not it was such answer is, we think, beside the question. It certainly cannot be said that defendant's counsel was not aware of the fact that the question of damages to be awarded was the most important one in the case and he cannot, therefore, be held to have been taken by surprise that his opponent argued the question of damages in closing the case.

Discovering no reversible error in this record, the judgment of the Superior court is affirmed.

AFFIRMED.

332 - 25211

216 I.A. 631

DAVID GILMOUR,
Appellee,

vs.

OTTO F. REETS,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff on a trial before the court had judgment against defendant for $155 balance claimed to be due for professional services rendered as a lawyer for defendant in certain matters set forth in the statement of claim and some cash disbursements. Defendant brings the record to this court for review.

The evidence is in sharp conflict and hopelessly in contradiction. Standing alone plaintiff's proofs support the finding and judgment. Upon the legal principles announced in an opinion in Dellemand v. Lederer, general number 25119, handed down coincidently with this, we ought not, in the circumstances, to disturb the finding of the trial court.

Defendant invoked the five year statute of limitations after denying in toto any employment of plaintiff. The statute was avoided by the payment of $5 on October 13, 1914, as claimed by plaintiff, which payment was denied by defendant. The trial Judge, however, gave credence to plaintiff's contention.

Plaintiff rendered an account to defendant several times, upon which defendant made payments. We think from this fact plaintiff established between the parties an account stated, as defendant at no time before suit disputed any of the items of this account, but in apparent affirmance of the correctness of the claim made payments thereon.

Defendant proffered evidence as to the value of plaintiff's services, set forth in his statement of account, which the court rejected. This, it is insisted, was error.

The claim was upon a contract denied by the defendant. On the verities of the contract claimed plaintiff must either succeed or fail; therefore, an attempt to introduce a quantum meruit as a defense was correctly ruled out as not being an issue in the case.

As no sufficient reason for reversing the judgment of the Municipal court appears in the record before us, it is affirmed.

AFFIRMED.

310 - 24661

GERMAN AMERICAN SAVINGS, LOAN & BUILDING ASSOCIATION, a corporation, et al,

Appellants,

vs.

JOHN C. TRAINER, et al,

HARRIET H. LEAMING, Executrix of the Estate of Jeremiah Leaming, Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

216 I.A. 631

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

In July, 1912, the Circuit Court of Cook County entered a final decree in favor of the defendants, in a foreclosure suit. In that proceeding Bartling, as Liquidator, Klappenbach and one Staiger who has since died, entered themselves as security for costs up to $2500.00. In the decree dismissing the complainants' bill it was provided that "the complainants" shall pay the costs of this proceeding and that execution issue therefor."

During the progress of that foreclosure suit, the cause was referred to Jeremiah Leaming, Master in Chancery, and he performed certain services as such. In May, 1917, the cause came on before Judge Honore of the Circuit Court of Cook County, upon the motion of defendant for a rule on complainant to file the Master's Report and the court entered an order reciting that it appearing that prior to the expiration of the term of office of Jeremiah Leaming as Master in Chancery, the said Master had performed services as such in said cause for which a reasonable

compensation was the sum of $1018, and that said charge had not been paid, it was therefore therein ordered that the suit be dismissed unless the said charges were paid within 15 days and it was further provided that complainant and defendant were each to deposit one-half of said sum of $1018, with the clerk of the court and the latter was to then turn the same over to the Master. It was further provided in said order that in case either or both of the parties should fail or refuse to deposit the sums provided, "the court reserves jurisdiction to enter such orders as to him seem appropriate under the circumstances." No objection was made by either party to the entering of this order. The defendant deposited his part of this money, but the complainant did not, and later the amount defendant had deposited with the clerk was refunded, to him and no part of the $1018 was ever paid to Master Leaming. Nothing further seems to have been done about the payment of these master's fees prior to the entering of the final decree in the case. After the expiration of the term of office of Master Leaming, the cause was referred to John W. Ellis, Master in Chancery, and in due course his fees as master were taxed as costs. There was an appeal to this court allowing the fees of Master Ellis and that order was affirmed. An appeal was also perfected in this court from the final decree entered in the case and that decree was affirmed March 10, 1914. In the meantime Jeremiah Leaming died and his widow, the appellee herein, was his sole beneficiary and duly qualified as executrix of the estate.

At the time the decree of the Circuit Court was affirmed by the decision of this court, no certified copy of the order of affirmance was filed in the Circuit Court but shortly thereafter the parties to the foreclosure suit made a settlement, and on April 16, 1914, a satisfaction piece executed by the defendants in that suit was duly filed in the Circuit Court and on April 30, 1914, a similar document executed by John W. Ellis, Master in Chancery, was filed in the Circuit Court. It seems that a satisfaction piece was also filed in this court. It further appears, that on the margin of the decree as it appeared in the Chancery Record Book, the clerk of the Circuit Court had certified as follows: "This judgment satisfied in full of record as per satisfaction piece filed this 16th day of April, 1914."

Nothing more was done concerning the payment of the fees of Master Lemming until December 26, 1917, when counsel for appellee, without notice, requested the clerk of the Circuit Court to tax the said sum of $1018 as costs in said foreclosure suit, in favor of said master, and the clerk did so and on the same day issued a writ addressed to the sheriff of Cook county, directing him in case said sum of $1018 was not paid within thirty days after demand, to levy the same on the property of appellants. This writ was served on Bartling, as Liquidator, on December 31, 1917 and on Kleppenbach on February 26, 1918. In May 1918, the certified copies of the orders of this court in the matters of the affirmance by this court of the order allowing the fees of Master Ellis and also of the foreclosure decree, were filed in the Cir-

cuit Court. Thereafter on June 26, 1918, on motion of appellants, the writ which had been issued to the sheriff by the clerk was quashed. On the same day, on motion of the solicitor for appellee, and over objection of appellants, the court entered an order finding that Master Leaming's fees amounting to $1018, had been ordered paid, "and taxed as costs," but had never been paid, and directing the clerk of the Circuit Court to amend his records in so far as they showed a satisfaction of the decree, by adding to the satisfaction piece, the following: "This certificate is not intended to include or satisfy Master Jeremiah Leaming's fees for $1018, which have been allowed by the court and are still unpaid." Appellants duly excepted to the entering of this order. On the same day, on motion of the solicitor for appellee and over objection of appellants, the court entered another order reciting that it appearing that Jeremiah Leaming, as Master in Chancery, rendered services herein, "which were fixed and allowed by the court at the sum of $1018"; and it appearing that such sum has never been paid, and that Jermiah Leaming died on January 30, 1908 and that appellee is his sole beneficiary and the duly qualified executrix of his estate and it appearing that the decree entered July 27, 1912 was affirmed on appeal and that the order allowing the fees of Master Ellis was affirmed on appeal and that certified copies of the orders of the Appellate Court affirming said decree and said order "are now and more than ten days last past have been" on file with the clerk of the Circuit Court," as required by statute', and it appearing that Master Leaming's fees have never been paid and that appellee is entitled to receive said amount of said

Master's fees and is entitled to have issued by the clerk, a fee-bill and execution forthe collection thereof by the sheriff and it appearing that Klappenbach and Stalger, as sureties, executed and entered themselves as security for costs in said suit "for the protection of the officers of this court, and all costs of suit, and the liability of said persons as security for costs has become fixed by the orders and decrees entered in this case and it appearing that by reason thereof said Klappenback and Stalger became obligated to pay any and all costs, including Master Leaming's fees, and by reason of the statute it became the duty of the clerk to tax the costs of said suit", and that the said Stalger has since died, and it appearing that the said costs were properly taxed by the clerk, including the fees of Master Leaming. "* * * the taxing of which by the clerk is hereby approved," and it appearing that the statute of Illinois makes it the duty of the clerk to issue an execution against the complainant and both of the persons entering themselves as security for costs or either of them, and it appearing that the liability had become fixed protecting the claim of Jeremiah Leaming and that execution might issue when the certified copy of the order of this court affirming the decree of the Circuit Court was filed in said court and it appearing that the same was then on file in said court, "it is ordered that the clerk of this court do issue forthwith a fee-bill and execution in accordance with the Statute of Illinois directing the sheriff to collect as costs from (complainants) the Master's fees due Jeremiah Leaming" as fixed by the order of May 20, 1907, at $1018 and that when collected said amount shall be paid over to and re-

ceipted for by appellee or her solicitor.

From the entering of this order, appellants have perfected this appeal.

By the order of May 20, 1907, Master Lemming's fees for his services as Master were fixed at $1018. These fees were subject "to be taxed as other costs." Ill. Statutes ch. 90, sec. 9. By the final decree, affirmed March 10, 1914 by this court, it was decreed that the complainants shall pay all costs. Thereupon it became the duty of the clerk of the Circuit Court upon proper application, a certified copy of the order of affirmance of the decree having been duly filed in the Circuit Court, to tax Master Lemming's fees as costs against the complainants. (Ill. Statutes, ch. 33, sec. 25) and against their security for costs or either of them (Ill. Statutes ch. 33, sec. 28) It is further provided in the section of the statute last referred to that when such bill for costs so made out and taxed by the clerk and duly certified under the seal of the court shall be delivered to the sheriff of the proper county, "he shall demand payment from the person therein charged; if payment shall not be made accordingly, within thirty days after such demand, the sheriff shall levy the same on the goods and chattels, lands and tenements of the person so chargeable." According to another provision of our statutes, the clerk of the Circuit Court might, upon proper application, issue a fee-bill for the costs represented by Master Lemming's fees "at any time within seven years" after the date of the affirmance of the foreclosure decree. (J. A. Illinois Statutes ch. 25 sec. 2153)

Until the rights thus secured to Master Leaming by the provisions of our statutes and the order fixing his fees had expired by limitation, they could not be taken away or destroyed except by the act of Leaming himself or his duly authorized representative. In our opinion this decree was never satisfied of record as to the fees allowed Master Leaming. Under the statutory provisions referred to, when the decree was affirmed by this court, the fees were subject to be taxed as costs against the complainant and his security for costs or either of them, the certified copy of the order of affirmance by this court having been duly filed in the Circuit Court, at any time within seven years after the date of the affirmance of said decree. The certificate in the Chancery Record Book as to the satisfaction of the decree could not have the effect of satisfying it as to the allowance of Master Leaming's fees. It read "This judgment satisfied in full of record as per satisfaction piece filed this 10th day of April, 1914." It is not shown that any satisfaction piece was filed on that date. Such a document executed by the defendant was filed on the 16th of that month and one executed by Master Klein was filed on the 20th but no satisfaction piece executed by Master Leaming or anyone in his behalf was ever filed, so far as the record shows. We are therefore of the opinion that the order of June 26, 1918, directing the clerk to amend his certificate of satisfaction of the decree on the records, should not have been entered. Such an order was not necessary. It has worked no harm to appellants however. After the certified copies of the orders of affirmance were filed

in May, 1915, the trial court became reinvested with jurisdiction and had the right to proceed as though no appeal had been taken. State Board of Equalization v. People, 191 Ill. 528; Smith v. Stevens, 133 Ill. 183. Any unpaid costs could then be properly taxed as provided by the statute and we are of the opinion that the trial court had the power to enter the order appealed from and it is therefore affirmed.

AFFIRMED.

24132

267 - 24132

ABE M. HONFELD, ET AL.,

Appellees,

vs.

JAMES CARILLO,

Appellant.

216 Ill. App. 632

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

216 I.A. 632

MR. JUSTICE TAYLOR delivered the opinion of the court.

Owing to a default in the payment of rent provided for in a written lease of certain premises for restaurant and saloon purposes, the plaintiffs, on July 5, 1917, brought suit in the Municipal Court against the defendant and on a cognovit obtained judgment in the sum of $730.

On October 8, 1917 the defendant moved the court to vacate and set aside the judgment, and on November 12, 1917, in support of said motion, filed an affidavit in which latter is was alleged, among other things, as follows: That the plaintiffs made the lease to him, the defendant, knowing and understanding that he, the latter, intended and expected to sell liquor upon the premises in question on each and every Sunday within the term of the lease in violation of the laws of the State of Illinois; that it was provided in the lease as follows: "The lessee shall have the right to terminate thislease by giving notice to the lessors within thirty (30) days after the closing of said saloon by the state or city authorities and sixty (60) days written notice in the

event that the Sunday closing law is generally enforced in Chicago, or in the event the city of Chicago shall discontinue the issuance of all saloon licenses."

On the same day an order was entered that the judgment be opened and leave given to the defendant to appear and make defense and that the affidavit stand as an affidavit of merits. Plaintiff then offered in evidence the lease and it was admitted by both parties that the amount set forth in the affidavit of claim in the sum of $730 had not been paid. The defendant testified himself to the effect that the premises were located at the corner of Harrison and State streets, Chicago; that he went into possession of them and remained there a little over two years, vacating them on January 26, 1916; that he conducted therein a saloon and restaurant business; that he served drinks and sold wines, liquors, beer, whiskey and brandy - intoxicating liquors - every day of the week including Sundays, that is from June 8, 1915, up to the time he quit doing business there.

Defendant also called as a witness one Hall, who carried on the negotiations on behalf of the plaintiffs which culminated in the execution of the lease in question. He testified that the lease was drawn at his office; that it was submitted to the plaintiffs, as principals. In the course of the trial the defendant offered to show that, at the time the lease was made, "he had a conversation with Mr. Hall, from whom he rented the premises, in which Mr. Hall stated to him that he would keep his place open on Sunday and sell intoxicating liquors there; that Mr. Hall understood that intoxicating liquors were to be sold on the

premises mentioned in the lease on Sunday * * * and it was with the express understanding between the parties that liquor was to be sold on Sunday, that this lease was made." Upon objection being made that the evidence was incompetent, the court ruled that it was inadmissible.

The question arises, having in mind the Sunday Closing Law (Criminal Code Chap. 38, Sec. 259) whether the contract was illegal.

The recent decision of the Supreme Court, Albert Hoefeld, et al v. James Cuello (No. 13702), passing upon the same lease, holds that it was not and is, therefore, decisive of this appeal. In that case, Mr. Justice Carter said: "The sole question involved in this proceeding is whether the provision or clause with reference to terminating the lease, if the state Sunday closing law is enforced in Chicago, renders the whole lease void. It is vigorously argued by counsel for plaintiff in error that this clause if not directly at least inferentially contemplates the violation of the state law against opening saloons on Sunday; that this optional provision intimated an intention to conduct a saloon in violation of the law. * * * This lease in our judgment was not shown to have been entered into with the intention of using the premises for an unlawful purpose." Such being the ruling of the Supreme Court, the judgment is affirmed.

AFFIRMED.

258 - 24183

ALBERT HOEFELD, ET AL,
Appellees,

vs.

JAMES OZELLO,
Appellant.

216 I.A. 632

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This cause, having been consolidated with general number 24182, is governed by our decision in the latter case.

The judgment is affirmed.

AFFIRMED.

172 - 24519

SOL K. GRAFF,
Appellee,

vs.

JULIUS E. LEVIN,
Appellant.

216 I.A. 632

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Claiming that a written contract, for the mutual exchange of certain real estate and upon which the plaintiff had paid $1,000.00 as earnest money, had fallen through, owing to the default of the defendant, the plaintiff brought suit and recovered a verdict and judgment of $1,000.00 against the defendant. From that judgment this appeal is taken.

On November 23, 1915, the plaintiff sent to the defendant a written contract for the exchange of certain properties. Accompanying the written contract was a letter, in which the plaintiff stated that a check for $1,000.00 was enclosed and was sent as earnest money to be applied on the purchase price of the premises when the deal was consummated. The contract of exchange was, accordingly, duly signed by both plaintiff and defendant and then on December 3, 1915, deposited in escrow with the Chicago Title and Trust Company. The contract provided, among other things, that the defendant would convey to the plaintiff two apartment buildings subject to

certain incumbrances, and that the plaintiff would convey to the defendant a certain building subject to certain incumbrances, and in addition pay the defendant $11,500.00 in cash and a judgment note for $500.00. The contract also provided that the defendant should furnish a guaranty policy, covering the two apartment buildings, and, also, that each party should furnish the other, within a reasonable time, either a certificate of title or a complete merchantable abstract of title or merchantable title or guaranty policy showing title at the time of the contract in the property conveyed; that in case an abstract or copy be furnished, objections thereto, in writing, should be made within ten days and, if material, and not cured within 60 days, after notice, the contract should, at the option of the party giving notice, become void. Further, either party delivering objections might elect to take such title as it then was, and in such case, the other party should convey as agreed, but, provided, that the party delivering such objections should have first given notice of such election, within ten days after the expiration of the said sixty days and tendered performance; that in default of such notice of election and tender of performance within the time limited, the party delivering such objections shall, without further notice by either party, be deemed to have abandoned his claim, and the contract should then cease to have any effect. Time was declared to be the essence of the contract.

The declaration recited that the plaintiff on November 23, 1918, paid $1,000.00 as earnest money to the

defendant; that it then became the duty of the defendant to furnish guaranty policies, that the defendant did not perform his obligation but neglected and refused to furnish them or any other evidence of title within a reasonable time, and declared that he would not perform; that the plaintiff was at all times ready and willing to perform said contract; that by reason of the failure and refusal of the defendant to perform, the plaintiff elected to declare the contract null and void and demanded a return of the $1,000.00, which defendant has failed to pay.

The defendant, in his pleading, denied that he neglected or refused to furnish guaranty policies; alleged that he diligently tried to carry out the contract; that he was prevented by the plaintiff who notified him that he considered the contract terminated; that the plaintiff failed within a reasonable time to furnish a certificate of title issued by the Registrar or a complete merchantable abstract of title, or a merchantable title guaranty policy; that the plaintiff never performed or offered to perform his agreement.

Five witnesses testified for the plaintiff and two for the defendant. Some time prior to the time of the contract, the properties the defendant agreed to convey (hereinafter called the Siegel and Zemon buildings) were in the name of Siegel and Zemon. There were outstanding certain liens on them in favor of a number of creditors. Finally, the Siegel and Zemon properties were conveyed to Judge Fisher in trust for the creditors. Subsequently an option on those properties, for a limited time, was given by Judge Fisher to the defendant, and, on November 23,

1915, the defendant wrote to Judge Fisher notifying him of his purchase of the properties, (pursuant to the option) subject to liens, respectively, of $12,600.00 and $27,500.00 and, further, stating that he would pay "at the date of closing" the sum of $9,500.00 and interest of $2,903.00.

The plaintiff testified that he had a number of conversations with the defendant, after the contract of exchange was executed, and that the latter said he was getting things arranged; that about February 3, 1916, the defendant told him, "We are doing the best we can; hustling as best we can."

The witness, Frank, testified that after the defendant had exercised his option he had several conversations with the defendant; that he asked him why he did not go ahead and close the deal and make delivery of title to the plaintiff; that he asked him whether he wanted to use the money he was getting from the plaintiff to clear his title up; that the defendant said "I don't want to pay out so much money". It is the evidence of the plaintiff that at the time in question he had under his control and subject to his disposition $11,000.00. The evidence of the defendant is that he was President of the North Side Sash and Door Company; that about ten days prior to November 23, 1915, he had a conversation with the plaintiff concerning the exchange of the properties; that the plaintiff said he desired to get hold of the buildings and that in view of the fact that the North Side Sash and Door Company had a lien on the build-

ings he asked him to use his influence so that he might obtain the buildings; that he had a number of conversations with the plaintiff prior to November 23, 1915, when the contract of November 23, 1915, and the letter were delivered to him; that he was given ten days time to make up his mind whether or not he could clear the objections to the title; that during the ten days he investigated the matter and on December 3, 1915, signed a contract and deposited it with the Chicago Title and Trust Company; that about a week later he had a conversation with the plaintiff who told him he was trying to place a mortgage on the property he was receiving under the contract but that he was having difficulty in doing so; that he told the plaintiff he could clear his property, that of the defendant, at any time. The defendant denied that he had stated that he would require the plaintiff to put up his money before he would attempt to clear the title. He further testified that the plaintiff never tendered a warranty deed or a judgment note, nor the $11,500.00, provided for in the contract or tendered his abstract of title or a guaranty policy, nor tendered a certificate of title by the Registrar.

The witness, Newman, attorney for the defendant, testified that he was present at a meeting on November 23, 1915, at which he told one Mayer, who represented the plaintiff, that Siegel and Zemon had originally attempted to construct the buildings; that, finding themselves in financial difficulties, they had been paid a sum of money by the creditors and then conveyed the property to Judge Fisher; that Siegel and Zemon had clouded the title to

some extent by filing affidavits, but had agreed to release those affidavits if they were paid about $200.00; that all the creditors had agreed to sell at a certain price; that he told him that if the plaintiff would sign the contract and tender it in the form of a proposition, together with his check of $1,000.00, they would take the matter up with Judge Fisher and then if they decided to go into it they would accept a proposition from the creditors and then, within ten days, accept the proposition of the plaintiff. He further testified that he told Mayer that there was nothing in the way of delivering the title to the plaintiff if the defendant could get it from the creditors at the price he had been given an option on. He further testified that on January 4, 1916, he had a conversation with Rathje, attorney for the plaintiff, in which he told him that the defendant had turned the matter over to him, the witness; that the letter of January 3, 1916, was ambiguous and that he desired to know definitely whether he considered the contract at an end or not so that the defendant could govern himself accordingly; that Rathje stated that "he intended to tell us that he considered the contract at an end, and wanted his money back."

The letter of January 3, 1916, signed by the attorney for the plaintiff is as follows:

> "Under contract of sale of premises to Sol K. Graff, you are required to deliver to the said Graff within a reasonable time, a merchantable abstract of title or merchantable copy thereof, brought down to date, or a merchantable guarantee policy issued by the Chicago Title & Trust Company, or a Registrar's certificate of title, issued by the Registrar of Deeds of Cook County, Illinois.
>
> The purchaser under the terms of said contract deems that the time which has expired since

> the execution of that contract, forthe delivery of said evidence of title, is unreasonable; that you have not complied with the terms thereof, and have in other things failed to perform said terms in the manner and within the time in said contract set out.
>
> Mr. Graff is ready at any time, to execute a cancellation ofsaid contract, and in any other way release you from liability under the execution thereof, provided you will within three days from this date, forward to Mr. Graff a draft for $1,000.00, representing the earnest money deposited under the terms of the contract in question.

The record shows that on January 26, 1916, the plaintiff brought suit in the County Court for the same claim upon which the present suit is based, and on January 29, 1916, elected to take a non suit. Two papers were offered in evidence, one dated June 29, 1915, purporting to be an examination of the title to lots 17 and 18 by the Chicago Title and Trust Company and setting forth title in Harry M. Fisher, subject to 28 objections, and the other, dated December 20, 1915, showing title to lots A and B in Harry M. Fisher subject to a number of objections. Certain evidence concerning a conversation which took place in February or March, 1916, at which were present, among others, Judge Fisher, Rathje, attorney for the plaintiff, and Newman, attorney for the defendant, having been ruled by the trial judge as incompetent, on the ground that it took place subsequent to the commencement of the first suit for the recovery of the $1,000.00, the plaintiff made the following proffer:

> The plaintiff offered to prove by C. G. Frank and five other witnesses that in February or March, 1916, at a conversation held in the court room of Judge Harry M. Fisher, Frank C. Rathje produced carbon copies of opinions of title, these being the documents already offered in evidence as Plaintiff's

Exhibits "b" and "d"; that Samuel W. Newman, attorney for Julius E. Levin, and Judge Fisher and others were present. That Mr. Rathje asked Mr. Levin what about the objections set out in these documents, and that then either Levin or Newman speaking for him, asked if Graff was ready with the amount to be paid in cash; that he then asked Rathje to guarantee the payment of it and that Rathje replied that he was not a guaranty company; that the money was ready and that Graff was ready to perform the contract on his part; that thereupon either Levin or Newman asked if the money could not be put in escrow with the Chicago Title and Trust Company and paid out in discharge of the liens on the Siegel and Lemon properties and Rathje speaking for Graff, refused to do this.

That thereupon Levin said substantially, "Do you think I am going to put my money in this lemon" and thereafter Mr. Newman said it cannot be done any other way. It is all off. We will now fight the matter out in a lawsuit. I offer to make the same showing above set forth by the witnesses, Frank C. Rathje, Paul B. Fisher and Alex Kroll.

The proffered evidence was, then, rejected.

At the close of all the evidence, certain instructions were given by the court, and the jury brought in a verdict for the plaintiff in the sum of $1,000.00, and, upon that, judgment was entered.

The verdict of the jury must be considered as based only on the evidence that was actualy admitted. And, that, in our opinion, is too vague and uncertain to justify a finding for the plaintiff. However, in view of the evidence that was offered and which was rejected by the trial court, it is our judgment that in the interest of exact justice in the case there ought to be a new trial. Of course, there is some evidence, in the present record, that up to February 8, 1916, the defendant was not ready and able to furnish a good title to his property. The plaintiff testified that the defendant said at that time, "We are doing the best we can;

hustling as best we can." There is, also, the testimony of Frank that on one occasion the defendant said, when asked why he did not go ahead and close the deal, "I don't want to pay out so much money". On the other hand, the testimony of the defendant is that, in a conversation with the plaintiff, the latter told him he was trying to place a mortgage on the property he was to receive, but he was having difficulty in doing so, and that, in that conversation, he, the defendant, told the plaintiff, he could clear his property, that is the property which the defendant was to give title to, at any time. Admittedly there is no evidence thata deed or judgment note or an abstract of title or a guaranty policy or a Registrar's certificate was tendered by the plaintiff, the latter relying on the claim that the defendant was in default and it was not necessary for him, the plaintiff, to make a tender. Further, there is the testimony of Newman, the attorney for the defendant, that he had a conversation with Rathje, the attorney for the plaintiff, in which he told the latter that the letter of January 3, 1916, was ambiguous; that he desired to know just what it meant, and that Rathje said that it was meant to inform him that the contract was at an end, and that the plaintiff desired his money back. It is true that when the letter of January 3, 1916, was written, about three weeks had transpired since the execution of the contract of exchange. Still, bearing in mind all the circumstances of the case, it does not follow that from that single fact, and the failure of the defendant within that time to tender performance, the plaintiff would be justified in considering the contract at an end even without making any tender on his own part.

As to the conversation which took place some time in February or March, 1916, in the court room of Judge Fisher, there is no doubt that it is the law that any and all statements, against interest made by the defendant and pertaining to the matters involved in the litigation are competent no matter when made. Voluntary admissions against interest are always admissible. As said in Marshall v. Sheridan, 10 S & R. 267: "As to the declarations having been given after the commencement of the suit, it is certain that the declarations or the acts of a party in the cause are always evidence without reference to the time when they were made or done. As in Morris's lessee v. Vanderen, 1 Dall. 65; Stubs v. Champlin, 4 Johns. 461; and 1 Phil. Ev. 79." Wigmore on Evidence, sec. 1056.

Under the circumstances we do not feel justified in reversing the judgment without remanding the cause for a new trial. It may be that what transpired at the time of the alleged conversation, when both parties or their representatives were present, was a complete justification for the plaintiff concluding that the contract was then at an end owing to the default or the statements of the defendant or his attorney, and that he was therefore entitled to a return of his earnest money. If the acts of the defendant justified the plaintiff in considering the contract at an end it would follow that he would be entitled to a return of the earnest money, the $1,000.00. After the defendant signed the contract, the earnest money became, pursuant to the contract, a pledge "for the faithful performance thereof" on the plaintiff's part, and, of course, if the contract failed owing to the default not of the

plaintiff but of the defendant, the latter would not be entitled to appropriate the earnest money or pledge of $1,000.00. All consideration had then failed without any default on the plaintiff's part. When the defendant became in default, if he did, the contract of exchange, a mutually executory bilateral contract, ceased to exist, and left as its sequel, an obligation on the defendant to return the earnest money to which he was then not entitled as the consideration therefor had failed.

As to the contention on the part of the defendant that the aplaintiff never tendered performance: It is the law that where a tender would be useless it is unnecessary. In Scott v. Beach, 172 Ill. 273, the court said: "As to complainant's failure to tender the amount due, the law is well settled to the effect that it was not necessary.' An actual tender by the plaintiff before suit brought is unnecessary, when, from the acts of the defendant or from the situation of the property, it would be wholly nugatory - a mere useless form. If, before or at the time of completion, the defendant has openly and avowedly refused to perform his part, or declared his intention not to perform at all events, then the plaintiff need not make a tender or demand its performance before bringing suit. It is enough that he is ready and willing and offers to perform in his pleading. 'Pomeroy on Contracts, secs. 360-365. See Lyman v. Gedney, 114 Ill. 388; D'Wolf v. Pratt, 42 id. 198; Clark v. Weis, 87 id. 438; Thayer v. Star Mining Co., 105 id. 540."

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

25832

216 I.A. 632

CITY OF CHICAGO,
Appellee,

vs.

BENSON LIGHTS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

PER CURIAM.

On August 19, 1919, the City obtained a judgment against the defendant in an action to recover a penalty for the violation of a city ordinance. Defendant prayed an appeal and filed his bond, but failed to file in this court his record on or before the second day of the term, as required by the statute. Sec. 100, chap. 110.

The appellee has filed a short record in this court, and moves for the affirmance of the judgment. Following the reasoning in the opinion of this court in City v. Salmitsky, 210 Ill. App. 159, this motion will be allowed, and the judgment is hereby affirmed.

MOTION ALLOWED AND JUDGMENT AFFIRMED.

131 - 23471

R. C. FOSTER,
Appellant,

vs.

EUGENIE GRAF,
Appellee.

21 I.A. 632

Appeal from
Municipal Court
of Chicago.

216 I.A. 632

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon the verdict of a jury which found the issues for the defendant. The case has been submitted to two juries. The first jury gave a verdict for the plaintiff, and the court granted a new trial. The case has also been considered by two appellate tribunals. This court affirmed the judgment of the Municipal Court in Foster v. Graf, 211 Ill. App. 272, but granted a certificate of importance to the Supreme Court, where the judgment of this court was reversed. Foster v. Graf, 287 Ill. 559.

The case was remanded to this court with directions to consider the errors assigned upon the merits, in accordance with the views expressed in the opinion of the Supreme Court. The opinion of that court shows that the judgment of this court was reversed because it had "predicated its judgment solely upon an erroneous conception of the law."

Applying the law of the case as stated by the Supreme Court, it now becomes our duty to consider the principal assignment of error argued by appellant, which is, that the verdict is contrary to the manifest weight of the evidence.

It will not be necessary to repeat facts stated in the opinion cited. The issue of fact was and is whether the

name of plaintiff was forged to certain checks, the amount of which plaintiff seeks to recover from defendant.

A prima facie case was made for plaintiff by the undisputed evidence that the endorsements appearing upon these checks were not in plaintiff's handwriting. It was admitted that Ryan had authority to affix the rubber stamp endorsement which was used in depositing checks in the plaintiff's bank account. The defendant, in rebuttal, did not attempt to show that Ryan, in fact, had authority to write plaintiff's name on the check. She relied upon evidence tending to show that the plaintiff had made certain oral admissions to that effect. She testified that on the day the warrant for Ryan was taken out, plaintiff said to her,

> "Why, Mr. Foster said to me that he felt sorry that I got mixed up in this trouble. He also said that Ryan was permitted to endorse those checks. And he was also permitted to --- well, now --- that if he needed money for the business he could go and get them cashed wherever he could, and he also said that the man could drink like a fish and nobody could tell the difference in the morning. That was practically all the conversation that took place on the street car that day at that time."

She also testified to a similar admission made by plaintiff when Ryan's case came up in the Criminal Court before Judge Petit. Adelor J. Petit testified that in 1914 he was a judge of the Circuit Court of Cook County, sitting in the Criminal Court, that he remembered Ryan's case which came up that year in his court. He says:

> "Well, in answer to a question by myself, or by the state's attorney, * * * Mr. Foster said that Mr. Ryan, the defendant was his collector and had a right or was authorized to sign the name -- his name -- Foster's name, to these checks."

On cross examination he said he did not remember whether a jury was waived, the name of the attorney representing Ryan, the name of the clerk of his court or that of the state's attorney representing the People, nor did he remember anything else Foster said there, nor whether Foster said anything about rubber stamps at that time nor whether the trial was held in summer, winter or fall.

He disposed of about two thousand cases in the two years he sat in the Criminal Court and probably five or six thousand witnesses testified before him during that time. He could not remember who was present.

On cross examination he was asked this question,

> "Q. Isn't it a fact, Judge Petit, that Mr. Foster at that time and place told you that Ryan had authority to use only rubber stamps to prepare these checks for deposit in Bank to his credit?
> A. Well, now, he may have said that, I can't remember."

Robert F. Turney testified that he was a judge of the Superior Court of Cook County, and from August, 1915, to July, 1916, presided over a branch of the Criminal Court. That Ryan was finally tried before him on a charge of grand larceny growing out of the transaction; that plaintiff was the prosecuting witness and that, with plaintiff's consent, the charge was changed to petit larceny.

He says the testimony of Foster was to the effect that Ryan was an all around man in the office, bookkeeper, cashier, made deposits at the bank, "endorsed checks if I recollect, occasionally went out and made sales in the yard." On cross examination he said he did not mean to testify in Foster's words. "I was giving the substance of it." He further said he didn't remember Foster said that the authority was to endorse with a rubber stamp. These conversations as testified to by the defendant and Judges Petit and Turney were specifically denied by plaintiff, who, however, admitted saying that Ryan

had authority to endorse with a rubber stamp.

The court reporter of the state's attorney's office testified, producing his note book, that he was in attendance when Ryan's case came up before the grand jury, that Mrs. Graf with other witnesses were then present and their statements were all taken in the room and in the presence of each other, that not a word appears in the testimony as to any statement by Foster as defendant claims, but that, on the contrary, Foster stated "The only authority he had was to take checks for deposit and take a rubber stamp 'Pay to the order of the Drovers' National Bank' and stamp R. C. Foster. He had no authority to sign my name to anything."

George C. Bessonet, who was one of the jurors during Ryan's case before Judge Turney says, "I did not hear Mr. Foster say at that trial that he had given authority to Ryan to sign his name on those checks and cash them. I do not recall that I heard any such testimony."

Benjamin Svec, who was minute clerk for Judge Petit at the times Ryan's case came up, testified that he heard the conversation with Judge Petit, that he "heard Foster say to Judge Petit that he gave this employee of his, Ryan, the authority of endorsing his checks with a rubber stamp in making deposits in the Bank, but he did not give him the right to go and sign the checks and cash them."

Charles C. Williams, the attorney who represented Ryan before Judge Petit, testifies that he heard the conversation between plaintiff and the judge at that time. He says, "Judge Petit asked Foster who made his deposits, He said, 'John Ryan'. He said, 'Well, how did he make his deposits if he did not have authority to sign your checks'. He said, 'He had authority to

use a rubber stamp. * *. Judge Petit said, 'Do you mean to say he never had authority to write, to sign your name as endorsing checks?' He said, 'I do'. Judge Petit says, 'I don't know whether using your rubber stamp is forgery or not. * * "

The same witness testifies that on the trial before Judge Turney, he, the witness, questioned Foster on this point, and asked Foster if it was not a fact that he had authorized Ryan to sign checks for small amounts, to which Foster answered, "No". He said, he did not have authority to sign, to do anything but use a rubber stamp.

Patrick H. Bonner, the police officer present at the trial, gives a substantially similar account of what occurred, as does John J. Farrell, another police officer who was present.

The burden was on the defendant to establish if she could, the authority of Ryan to endorse these checks. The evidence offered by her was in the nature of oral admissions claimed to have been made by the plaintiff against his own interest. While this class of evidence is undoubtedly admissible, it is usually most unsatisfactory. In Crowell v. Western Reserve Bank, 3 Ohio State 412, it was said thereof:

> "No class of testimony, perhaps, is more unreliable and a more frequent cause of error in courts of justice than the narration of conversations real or pretended."

Sir John Romilly in Greenslave v. Dare, 20 Beav. 284, said:

> "I pay very little attention to the affidavit of any party that the adverse party has admitted the whole question in the controversy between them to be against himself."

We think a preponderance of the evidence indicates that Judges Petit and Turney were mistaken as to the statement made by plaintiff, as indeed, they admitted upon cross-examination, this might be so. We think the judgment is clearly and manifestly against the preponderance of the evidence, and for this reason it will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED

6 - 24017

JOHN CERNY,
Plaintiff in Error,

vs.

JOSEPHINE CIHLAR, GEORGIANA CIHLAR, ANNA LUKES, guardian of Stanislaw Cihlar and THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

216 I.A. 633

Error to

Superior Court,

Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review an order of the Superior Court of Cook County finding plaintiff in error guilty of several contempts of court and punishing him therefor.

Plaintiff in error was appointed receiver of certain premises by the Superior Court November 3rd, 1910. He appears to have some interest in the premises and the order appointing him provided that he should serve without compensation. On August 17, 1917, he was directed by an order entered in the case to file his final account and report within three days. On October 4th thereafter an order was entered, reciting that he had failed to file this report and ordering him to show cause within five days. A certified copy of this order was duly served on him October 8th, and on October 27th he having failed to show any cause, an attachment against him was issued. On December 3rd he was released on his own recognizance to appear in court December 5th, at which time the matter was continued to December 7th, and on that date his recognizance was forfeited for failure to appear. On December 12th having "shown no cause" he was found guilty of contempt and committed "to the common jail of Cook County, Illinois, for a period of thirty days, there to remain charged with said contempt of

this court or until released by due process of law." On December 13, 1917, this order was vacated in order to enable him to prepare his report as receiver, and the motion to punish him was continued until December 17th, and at that time until December 19th thereafter. On December 17th plaintiff in error filed his report as receiver, showing the collection of $1,260.89, and the expenditure of $423.81, as shown by receipts produced. The report also set forth further expenditures of $300 for which vouchers were not produced. In this report plaintiff in error also asked allowance for compensation and reasonable counsel fees. On December 20th an order was entered removing plaintiff in error as receiver and naming one Hansen as his successor, upon said Hansen giving bond in the sum of $2,000. The order further directed plaintiff in error to turn over and deliver, instanter, to Hansen all the property, both real and personal and "all money collected by said John Cerny as receiver, as well as any and all choses in action and property of every kind received by him as receiver."

The bond of the new receiver was filed and approved on December 21st. On the same day plaintiff in error made a motion in writing that he be given three days time from that date in which to file an amended report as receiver. This motion does not appear to have been passed upon, but on the same day an order was entered, reciting the proceedings for contempt as above set forth, and further,

> * * * * the court further finds that said John Cerny wilfully and contemptuously failed to file his bond as receiver, before acting as receiver of this court as by order of this court directed to do.
>
> And it further appearing to the court that the said John Cerny wilfully failed and refused to comply with said order to file his final, true and correct report and account, as aforesaid, as ordered, and failed and refused to show cause why he should not

H

be punished for contempt of court. The court therefore finds that the said John Cerny is guilty of a contempt of this court * * * .

It is therefore ordered, adjudged and decreed that the said John Cerny be and is hereby fined therefor the sum of One hundred ($100.00) and that he also be committed to the common jail of Cook County, Illinois, for a period of five days from the date hereof, there to remain charged with the said contempt of this court for said five days or until released by due process of law, and that he also remain in said jail until said fine is paid.

And now the court having ordered the said John Cerny, he being present in open court, to turn over and deliver to Walt A. Hansen, the present receiver herein and successor of said John Cerny, all the money and property collected and held by him as receiver which said John Cerny advised this court would aggregate the sum of, to-wit, $1,260.89, and the said John Cerny being well able to do so, wilfully and contemptuously refuses to do so, and wilfully and contemptuously to divulge the present depository or whereabouts thereof, and the court therefore finds that the said John Cerny is guilty of contempt of this court * * * and it is therefore ordered, adjudged and decreed that the said John Cerny be and he is hereby fined therefor, the additional sum of One Hundred Dollars ($100.00), and that he be committed to the common jail of Cook County, Illinois, for an additional period of five days from this date, there to remain charged with said contempt of this court for said five days last named, or until released by due process of law, and that he be held in said jail until said fine is paid.

And it is further ordered, adjudged and decreed that the said John Cerny be confined in the common jail of Cook County, Illinois, for an additional period until his final, true and correct report and account as such receiver is filed and approved by this court, and all of the moneys and other property collected by him as such receiver is turned over to his said successor, there to be charged with said contempt of this court for a total and aggregate period not to exceed six months or until released by due process of law, and to be released upon compliance with said order last named, and that warrants for said commitment issue forthwith, directed to the Sheriff of Cook County, Illinois, to execute."

Plaintiff in error contends as to the first paragraph of the order that it is erroneous and void because the proceedings were criminal in their nature and should have been entitled in the name of the People. The courts of this State seem to recognize a "twilight zone" between acts constituting criminal and civil contempts. People v. Elbert, 287 Ill. 463. Whether

the proceeding is carried on in the name of the People or in that of some party to the suit is regarded as a matter of comparatively little importance. Lester v. The People, 150 Ill. 426; Hake v. The People, 230 Ill. 193.

Further it is urged that, as plaintiff in error was sentenced on December 12th to thirty days in the County Jail and began to serve the sentence, a new and different punishment could not thereafter be imposed for the same offense. This might be true if the offense of which he had been found guilty was a criminal contempt. The order under which he was committed, however, was coercive and civil in its nature. The penalty imposed was therefore not exclusive. The court could impose other penalties until there was full compliance with the order of the court. Lester v. The People, supra.

Plaintiff in error next contends that the order of commitment is in part punitive and in part remedial and having been entered in a civil case is erroneous for that reason under the authority of Gompers v. Bucks Stove & Range Company, 221 U.S. 418. The ruling of that case is not followed in Illinois in cases in which, as here, federal questions are not involved. Rothschild v. Steger Piano Co., 256 Ill. 196.

It is next contended that the order is erroneous because it fails to state to whom the fines of one hundred dollars each are to be paid. This was held to be necessary in Smith v. Terney, 62 Ill. App. 571, and McDonald v. The People, 86 Ill. App. 558, but these cases were overruled in the later case of Oster v. The People, 94 Ill. App. 288, for the reason as stated in the last cited opinion that the statute supplements the order and thus makes it clear to whom the fine should be paid. These contentions cannot be sustained. Nevertheless, we think the order

as entered was in several respects erroneous.

The record shows that the report of plaintiff in error, as receiver, was filed on December 17th, and that no objections were filed to it until December 21st, and the record seems to indicate after the order of commitment was entered. We think this report should have been disposed of in some way before this order was entered. The order directs plaintiff in error to turn over the whole amount of money collected by him, while his report (undisposed of and at the time of sentence not yet objected to) showed expenditures made by him of which only a part were objected to when objections were filed. It is difficult to see how plaintiff in error could comply with an order of the court to turn over the property in his hands to his successor before the court determined what property was to be turned over by ruling on the objections. Moreover, the first part of this order purports to punish plaintiff in error for an alleged contempt of court in failing to file his bond as receiver before acting as receiver of the court. No rule had theretofore been entered by the court against plaintiff in error with respect to this charge. There was no proceeding before the court in which this charge was made.

The first paragraph of the order also purports to punish for failing to comply with the former order to file a report. The record shows, we think, that plaintiff in error was guilty of contempt in failing to file his final report as ordered, but he purged himself of that contempt by subsequently filing it. A single punishment seems to have been meted out by this paragraph for two contempts, one of which the record fails to show plaintiff in error was guilty of, and the other of which the record shows he had purged himself of.

By the second paragraph of the order plaintiff in

error is found guilty of contempt for having refused to turn over "in open court" the money and property collected of the aggregate amount of $1,260.89 to his successor as receiver, and an additional fine and an additional commitment is imposed therefor. No rule had been entered to show cause in this respect. The report was undisposed of. There was no proceeding giving jurisdiction for this alleged contempt. Plaintiff was entitled to his day in court. Salomon v. Holdom, 72 Ill. App. 346.

We think, too, the third paragraph of the order is erroneous in that it commits plaintiff in error to jail for an additional period until his true and correct report and account should be filed and "approved by this court." If the report filed is insufficient, the court, undoubtedly, by a proper order entered could direct plaintiff in error to file an additional report, and if he failed to do so, in a reasonable time, punish him therefor, or by fine or imprisonment coerce him into obeying the order. In such case plaintiff in error would "carry the key to his own prison." But plaintiff in error cannot do anything which would compel the court to approve his account. The court might fail to do that either for lack of time to take the matter up and consider it, or having considered it, might err in its judgment as to whether or not the account should be approved. In the meantime according to this order plaintiff in error would have to remain in jail. The liberty of citizens may not thus lightly be taken away in this State.

We find it impossible to separate the wheat from the tares or the good from the bad in this order. It will therefore be reversed.

REVERSED.

26 - 24527

HARRY PODOLSKY, JOSEPH KATZ and BENJAMIN BARNETT, doing business as PODOLSKY & KATZ,
Plaintiffs in Error,

vs.

BENJAMIN FISHMAN, doing business as BENJAMIN FISHMAN & COMPANY,
Defendant in Error.

216 I.A. 633

Error to

Municipal Court

of Chicago.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment for defendant entered upon the verdict of a jury.

The plaintiff below sued for damages on an alleged agreement to deliver 205 barrels of flour at the price of $6.70 per barrel, which defendant did not and would not deliver, whereby plaintiffs were deprived of divers great gains etc.

Defendant filed an affidavit of merits denying the facts as set out in the statement of claim, and later filed an additional affidavit, setting up section 4 of the Uniform Sales Act, Hurd's Revised Statutes, Chap. 121a, claiming that the alleged contract could not be recovered on by reason of that section.

The evidence showed that a car of flour of 205 barrels was sold to plaintiffs, August 11, 1916, by one Smith, a broker; that Smith made a memorandum in writing of the sale, containing the names of the vendor and vendees, amount of flour sold, and the price and terms. The terms were stated to be "Cash, less 1%", the writing also stated "Accepted, B. Fishman, by phone".

A copy of this memorandum was given to plaintiffs at the time.

It was admitted defendant had the flour for sale,

and employed Smith to sell it on the terms stated in the memorandum, but the defendant testified that before completing the sale Smith called him up, and that he told Smith that if he sold to plaintiffs, he, defendant, would have to have a deposit of $200.

This evidence was let in over the objection of plaintiffs, and the case went to the jury under instructions by which it was told that if the jury believed Smith was not authorized to make and enter into the contract as testified to, it should find for the defendant.

Plaintiffs' claim that since the contract was made while Smith was acting within the admitted apparent scope of his authority, and the direction to require a deposit, if given was a secret or private limitation on the general authority of Smith, plaintiffs would not be bound thereby, citing 2 Corpus Juris, p. 566, section 209.

We do not think it necessary to decide whether the law cited is applicable to the facts of this case, because we think a preponderance of the evidence indicates that the direction to require a deposit was never, in fact, given. Under the pleadings, the burden was on defendant to prove this. The only proof offered, is his own testimony, which is practically uncorroborated. It is denied by Smith, who is, apparently, disinterested. It is also improbable because the sale was for cash. It contradicts the written memorandum made at the time. The new trial should have been granted. For this error, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

34 - 24701

216 I.A. 633

CORNELIUS SHANAHAN, Appellee, vs. ALEX PODOLSKI and JOHN PODOLSKI, Appellants.	Appeal from Circuit Court, Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of $500 for plaintiff, entered on the verdict of a jury. The action was on the case for alleged personal injuries sustained by plaintiff July 31, 1915, as a result of colliding with a horse and wagon owned by defendants, and driven by their servant.

The declaration in several counts charged negligence generally, in other counts it alleged plaintiff's injury was brought about through the violation of certain ordinances of the City of Chicago, limiting speed and requiring vehicles to keep close to the right hand curb, "as safety and prudence shall permit", and that "An overtaken vehicle must at all times be passed on its left side."

Defendants pleaded the general issue.

At the close of all the evidence defendants moved for a directed verdict in their favor, which was denied. Error on this ruling is assigned and seems to be the principal point relied upon. Appellants say:

> "At the close of all the evidence, there being no dispute as to the evidentiary facts, no proper question of fact, whatever, was presented for the determination of the jury. The ultimate facts, whether or not the plaintiff exercised ordinary care and was not guilty of contributory negligence, and whether or not the defendants exercised due care and caution and were not guilty of negligence, -- were purely questions of law."

This is not a correct statement of the law applicable to this class of cases. The ultimate questions of negligence and contributory negligence are usually for the jury, and become questions of law for the court only when the evidence with all reasonable inferences to be deduced therefrom, can lead to only one conclusion. Devine v. Delano, 272 Ill. 166; MacGregor v. Reid, Murdoch & Co., 178 Ill. 464; Dewey v. Chicago Rys. Co., 174 Ill. App. 283. The court did not err in submitting the case to the jury.

Neither are the facts in the case "undisputed" as appellant says.

The accident occurred about 3 o'clock p. m. on July 31, 1915, in the City of Chicago and in Milwaukee avenue, a public street, extending diagonally northwest to southeast. The exact point at which it occurred is disputed. A plat showing the location of the points at which the respective parties claim the collision took place is in evidence. North Rockwell street runs into Milwaukee avenue from the north, but does not cross it. On the opposite side of the street, Francis Place, another public highway, runs into Milwaukee avenue from the southwest. The easterly line of Francis Place is about 100 feet northwest of the west side of North Rockwell street projected across Milwaukee avenue. The southeast corner of Francis Place and Milwaukee avenue was known as No. 2148. A saloon was located at this number. The point of the west line of North Rockwell street projected to the south side of Milwaukee avenue, was known as No. 2140. A cross walk connected these two points. There was also a cross walk extending from the west side of the side walk of North Rockwell street to the saloon, on the southeast corner of Francis Place. In the center of

Milwaukee avenue were double railway tracks on which street cars were being operated.

The testimony for plaintiff tended to show that at the time in question he was about to cross from the west side of North Rockwell street to the saloon at No. 2148; that he looked before doing so and saw a van coming from the northwest on Milwaukee avenue; that he saw he would have time to pass it, and did so about 3 feet in front of it; that just as he passed in front of the van, defendants' horse and wagon (which by reason of the size of the van plaintiff could not see) coming from behind on the right hand side of the van at a speed of ten or twelve miles an hour, struck plaintiff and caused his injuries.

On the other hand, defendants' driver testified that the accident occurred in front of No. 2140 Milwaukee avenue, that defendants' horse was driven at a slow trot and a little behind the van, when the plaintiff ran right ahead of the van and into the shaft of the wagon.

The driver of the van testified that the plaintiff walked twenty-five or fifty feet in front of his van; that the team that hit plaintiff was also 25 or 50 feet "in front of my team"; that plaintiff was walking when hit.

Other witnesses testified that plaintiff walked in back of the van and thereafter came into contact with the wagon. The pitcher in plaintiff's hand corroborates the evidence for him to the effect that he was on his way to the saloon. There is no explanation of why he should have been walking in the opposite direction as defendants claim.

In this conflicting state of the testimony it was peculiarly the province of the jury to determine the truth of the matter. If the story told by the plaintiff and his witnesses was true, then the jury was justified in finding that

defendants were guilty of negligence, and that plaintiff was free from contributory negligence.

On the other hand, if either one of the conflicting stories told by defendants' witnesses was correct, the plaintiff was guilty of contributory negligence.

We are not dissatisfied with the verdict of the jury. It follows that the court did not err in refusing to grant defendants a new trial.

Appellants say that the court erred in giving certain written instructions for plaintiff, but nowhere in their brief or argument do they point out the supposed error. One of these instructions was to the effect that plaintiff made out a prima facie case by showing that he was in the exercise of due care at the time of the injury, that the defendants were violating an ordinance of the city, and that the violation wasthe proximate cause of the injury. Another stated that the law of the road at the time in question was that a vehicle overtaking and passing another going in the same direction should pass to the left.

Fifteen instructions were given for defendants covering, apparently, their theory of the case from every standpoint. No instruction was refused.

We find no error in the record and the judgment will be affirmed.

AFFIRMED.

370 - 24723

216 I.A. 633

MAX HECHT,
Appellee,

vs.

LEOPOLD OSTERRICKER,
Appellant.

Appeal from
Superior Court,
Cook County.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in favor of plaintiff in an action for malicious prosecution. It is now before us by reason of a rehearing granted.

The plaintiff, who was appellee, having died his administrator has been substituted.

The declaration charged that on March 1, 1915, defendant, contriving to injure plaintiff's good name, credit etc., "before a judge of the Municipal Court, falsely, maliciously and without any reasonable or probable cause, charged plaintiff with having stolen one electric motor of the value of $200, one set of double harness of the value of $50, one saw filer of the value of $75, one desk of the value of $15, one chair of the value of $5. That defendant caused a warrant to issue and plaintiff to be arrested and brought into court, and that the plaintiff was by the court adjudged "not guilty" and discharged.

The defendant pleaded "not guilty".

The jury brought in a verdict for plaintiff of $600 on which the court entered judgment.

Appellant argues that plaintiff failed to show want of probable cause; that it is established upon the evidence that defendant in causing the arrest of plaintiff acted in

good faith and on the advice of counsel after a full disclosure of the facts known, and that he will therefore be protetted. The proper consideration of these points makes an examination of the evidence necessary.

Plaintiff with his father Julius Hecht, and a brother named Henry, lived at their home No. 2340 Diversey boulevard. The father owned a bunch wood manufacturing plant, located at 2609 Jones street. In connection with this business he owned and used wagons, horses and harness, which were kept in a barn in the rear of his home. By bill of sale, dated July 19, 1912, Julius Hecht transferred all this property to the United States Wood and Coke Company, of which defendant was president, and received in payment $6,000 par value of the stock of the corporation. Thereafter for a time the father and two sons worked for the said company.

The defendant claims that he first missed the property which was alleged to have been stolen just before Julius Hecht left the employment of the corporation which was April 6, 1914. The sons quit prior to that time.

On March 31, 1914, defendant, as president of the company and in its name caused a written notice to be served on Julius Hecht, in which, among other things, it was stated: "You are further notified that under a bill of sale from you to the United States Wood & Coke Company, dated July 19, 1912, you sold to said corporation with other property, the tools, machinery, equipment, furniture and fixtures, located at 2609 Jones street, together with four horses, four wagons and all harness and equipment, located at 2340 Diversey boulevard, and you are directed and notified hereby to deliver to said United States Wood & Coke Company, and no other company, all of said property, and to transfer said horses, wagons, harness etc., from the barn at 2340 Diversey boulevard

to barn at 1321 Altgeld street, upon the property of the United States Wood & Coke Company."

After this demand was made most of the property covered by the bill of sale was delivered to the corporation, but none of that which is alleged to have been stolen.

On February 18, 1915, a search warrant was issued on the complaint of defendant against the premises known as 2340 Diversey avenue. The motor and saw filer were found on this search in the basement covered with burlap. These were turned over to the owner. Another search warrant was issued against the same premises on March 1, 1915, and upon this search warrant the harness was taken off the plaintiff's horses. The property taken was turned over to the owner. The desk and chair were not found but it appeared upon the trial that they were in the possession of Julius Hecht. Plaintiff claims that the ownership of the harness was "desperately disputed." It is not denied that the other articles were the property of the corporation. Plaintiff testified that his father, Julius, told him to keep the saw filer and motor and that they were moved from Jones street by plaintiff in daylight - "there were one or two men with him." On cross examination he said that he did not remember the names of these men, nor could he tell when the goods were removed. Julius Hecht testified that in April, 1914, while he, the witness, was in the employ of the United States Wood & Coke Company, defendant Osterricker told him to take these goods to a place of safety. He says, "The saw filer, motor, desk and chair I had removed from the factory upon Mr. Osterricker's say-so, to take them to a place of safety several months before I had been discharged from my position by Mr. Osterricker, in the first few days of April, 1914. I had reported to Mr. Osterricker that the machinery and all other goods were not safe where they are at

2609 Jones street. It was not running at that time. I reported to him that the boys in the neighborhood had taken off brass nobs and used the iron and sold it for junk. He said, 'Have you not got a place in your barn? Could you not move it to that place and place it there for storage?' I said 'Yes, I have.' He said, 'Well, go ahead and do it, the sooner the better.' I did it. He said I might send another man to go over and remove it. Another man, Gaylord. They were removed."

Another brother testifies to overhearing a somewhat similar conversation. This conversation is denied by defendant Osterricker, is inconsistent with the testimony of several apparently disinterested witnesses, and is improbable in view of all the facts and circumstances in evidence. It appears from evidence (at first excluded by the court, erroneously as we think, but afterwards in substance admitted) that there was abundant room for the property on the premises of the owner, that these premises were guarded, and that no necessity existed for storing the property with the Hechts.

It is clear that the written notice of March 31, 1914, was served after the time of this supposed conversation. That notice was broad enough to cover this property. The retention of the property for almost a year after this notice was served and after the discharge from service of Julius Hecht on April 6th immediately following, and the further retention of part of it after the service of the search warrants, are inconsistent with the theory that the property was in defendant's possession by reason of any such request.

We think a clear preponderance of the evidence indicates that no such agreement was, in fact, made. Assuming this to be true, it then affirmatively appears from the record that all the facts within defendant's knowledge, or which with reasonable

diligence could have been known to him, were communicated by him to his counsel prior to the taking out of the search warrants, and also that before causing the warrant for plaintiff's arrest to issue, he likewise laid all the facts before his counsel and acted only upon his advice after making a full disclosure to him. In Shea v. Morand, 191 Ill. App. 11, this court held:

> "Where a prosecuting witness presents all the facts within his knowledge, or that he could have ascertained by reasonable diligence, fairly and without reserve to a state's attorney or some other lawyer of recognized ability and good standing, and in good faith acts on his advice, he cannot be held responsible in an action for malicious prosecution."

We have held to the same effect in Abel v. Downey, 110 Ill. App. 343; Conklin v. Whitmore, 132 Ill. App. 574; MacLean v. Adams Co., 143 Ill. App. 77. And the Supreme Court has announced the same doctrine substantially in Lowenthal v. Streng, 90 Ill. 74; Anderson v. Friend, 85 Ill. 135.

The plaintiff therefore failed to prove want of probable cause or malice, both of which were necessary to a recovery. (Glenn v. Lawrence, 280 Ill. 581.) We are satisfied from a careful examination of this record that plaintiff cannot recover. That appellant's decedent was in fact innocent would make no difference. (Palmer v. Richardson, 70 Ill. 540.)

The judgment will therefore be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

370 - 24723

FINDING OF FACT.

We find that appellant, Leo Osterricker, did not prosecute the suit referred to in plaintiff's declaration without reasonable and probable cause for its prosecution.

486 - 24840

ROSA KAUFMAN, as executrix of the last will and testament of JOSEPH KAUFMAN, deceased,

Appellant,

vs.

EUGENE GEHM et al.,

Appellees.

216 I.A. 633

Appeal from

Circuit Court,

Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was originally a claim filed in the Probate Court of Cook County against the estate of Joseph Kaufman. It was allowed for the sum of $241.30.

The claimant, who is appellee here, appealed to the Circuit Court, where upon trial before a jury a verdict for claimant in the sum of $517.50 was returned on which the court entered judgment. The claim was for the purchase price of potatoes sold to Joseph Kaufman & Co., a copartnership, December 29, 1913.

The defendant upon the trial contested the fact of the delivery of the potatoes, and now argues that claimant's exhibits 1a to 7, inclusive, and exhibit 9 as well as certain exhibits B to I based thereon, were improperly admitted in evidence. These exhibits 1a to 7 purport to be orders upon the Storage Company for the delivery of the potatoes to Kaufman & Company. Objection made is that the signatures to these orders were not proved to be in the handwriting of employees of the defendant. It was proved that the orders referred to the potatoes involved in this controversy and were orders issued out of the office of Kaufman & Company, and that Kaufman & Company thereby obtained the potatoes.

We do not think there was any error in admitting these

exhibits. In fact the sale and delivery of the potatoes at the price of 45 cents per bushel is established beyond any reasonable doubt.

The defense relied upon was that the sale was illegal because the potatoes were unfit for food and therefore contrary to the provisions of the health ordinances of the city which are in evidence.

The potatoes were at the time of the transaction stored with the Western Cold Storage Company. Joseph Kaufman, before buying, sent one Tauber, a man of eighteen years experience in the business, to inspect these potatoes and he inspected them. They were in bad condition, and under Tauber's direction were sorted, the best ones sacked and delivered to Kaufman & Company. Appellant claims that the potatoes were condemned by the city "as unfit for human food" on January 6, 1914, about eight days after the sale, and that this precludes a recovery. The order of the health department with reference to the potatoes is in evidence and shows that instead of being condemned, the potatoes were "held for salvage". The evidence shows it was only these salvaged potatoes, sorted by defendant's own expert, for which payment was claimed and allowed.

The issue was submitted to the jury which found, we think correctly, for the plaintiff. Defendant complains of the court's refusal to give defendant's instruction No. 6 which told the jury claimant could not recover if the potatoes were contaminated etc. or unwholesome for human consumption, whether or not either claimant or Kaufman & Company knew of the condition thereof. The jury was substantially so instructed in other given instructions.

There is no error in the record and the judgment will be affirmed.

AFFIRMED.

498 - 24852

I. LURYA LUMBER COMPANY,
a corporation,
Appellant,

vs.

JAMES L. MARENO et al.,
Appellees.

216 I.A. 634

Appeal from
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellant was complainant below and appeals from a decree which dismissed for want of equity a bill to foreclose a claim for mechanic's lien amounting to $959.07. The cause was heard upon exceptions to the master's report, which exceptions were overruled, and a decree entered as recommended by the master.

The bill was in the usual form. The answer, which was joint and several, set up that complainant had agreed to waive any and all right to a lien upon the payment to it of $700; that defendants in making loans and taking their titles relied upon these representations and agreements of complainant in that respect; that after $500 had been paid on account to complainant out of the loan made in reliance upon these representations and agreements of complainant, complainant failed and refused to complete its contract to furnish lumber when requested by defendants so to do; that the complainant was therefore estopped from asserting its lien.

The facts appear to be that on April 14, 1916, James L. Mareno was the owner in fee simple of the premises, which consisted of two lots, and that one Tessitore, held the legal

title in trust for Mareno, and afterwards conveyed the same to one Riccio, who also held it in trust for Mareno; that Mareno began the construction of two houses upon the premises and made a contract for the lumber with the complainant, agreeing to pay a reasonable price therefor, and to make final payment at the date of the last delivery; that plaintiff commenced to deliver the lumber on April 14, 1916, and continued to make deliveries up to August 28, 1916, and up to that time delivered lumber of the value of $1,459.07.

On June 23, 1916, Mareno negotiated two loans from the defendant Garfield Park State Savings Bank, in the sum of $4,250 each, and to secure these loans, caused the premises to be conveyed to the Chicago Title & Trust Company, as trustee. Before making the loan the bank demanded and secured a sworn statement from Mareno as to the lien claims against the premises. This statement as furnished stated that James L. Mareno was the general contractor, and that "the following are the names of all parties having contracts or subcontracts for specific portions of the work or for material * * and of the total amounts due and to become due each, to fully complete said contracts, and that the items mentioned include all labor and material required to complete said building according to plans and specifications." In its appropriate place appeared the name of complainant as contractor for "lumber" and the "total to complete" was stated to be $700. This statement was made by Mareno after a consultation with complainant's president and with his authority and consent. The agreement between Mareno and complainant was that the balance of complainant's claim would be secured by a third mortgage.

Defendant William C. Thompson had charge of the matter for the bank and upon receiving the statement made inquiries of

the secretary of complainant, who verified it by oral statements, and also on June 16, 1916, wrote the bank as follows, "We will release two two-flat buildings located at 414 and 416 South Kilbourn avenue, Chicago, Illinois, for the sum of $700. These buildings in question are for Mr. James L. Mareno."

Thereupon on June 27th Tessitore and Mareno gave an order on the bank in favor of complainant for the sum of $500, which stated on its face that complainant was the contractor for the lumber, that the contract price was $700, and that complainant was entitled to a payment of $500. This order was cashed by complainant and its receipt in writing appears upon the back of it. The work on the building which had been stopped because of lack of funds was again resumed upon the opening up of the loan. As a general settlement of the whole building enterprise, one lot was transferred to defendant Thompson, another to defendant Freed, and a second trust deed executed to defendant Filip Meydrech Co.

We think the chancellor was justified in finding from the evidence that all the defendants, in taking their respective titles, relied upon the representations of complainant as they appeared in the sworn affidavit of Mareno, the receipt of the complainant thereon, the letter of complainant and oral representations of its officers.

The appellees who therefore took their respective titles relying upon these representations, and without knowledge of any agreement of Mareno to give complainant a third mortgage, will be protected, and as against them, complainant is now estopped to maintain a lien for more than $700. Heidenblutt v. Rudolph, 152 Ill. 316; Bowers v. Jarrell,

210 Ill. App. 256; Commercial Loan & Bldg. Assn. v. Trevitt, 160 Ill. 390; Turner v. Branco, 249 Ill. 396.

The parties in interest requested complainant to furnish the lumber necessary to complete its contract, which it declined to do, and defendants were compelled to purchase it elsewhere at a cost of about $200. In view of this wilful refusal to complete its contract, it cannot now be allowed a lien. Harley v. Sanitary District, 226 Ill. 213; Peterson v. Pusey, 237 Ill. 204; Errant v. Columbia Western Mills, 195 Ill. App. 14.

The decree will be affirmed.

AFFIRMED.

65 - 24914

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

MARY GRANT,
Plaintiff in Error.

216 I.A. 634

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE MACHRATT
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged with the larceny of $15 from one Thomas W. Evans, waived a jury, entered a plea of "Not guilty", was found guilty upon trial by the court, made motions for a new trial and in arrest of judgment, both of which were overruled and judgment entered.

Evans testified that while walking down Broadway, in Chicago, November 8, 1918, at about 10 o'clock p. m., defendant, a woman, motioned to him from across the street; that he crossed over to where she was under the belief that he was acquainted with her; that when he found he did not know her, he attempted to go away, but she detained him, followed him down the street, and when he entered a hallway of a building, went in with him; that while they were there defendant put her hand into one of his pockets, extracted a roll of money; that of this amount, $15 dropped to the floor which he picked up and asked defendant to give back the rest of the money, which she refused to do. That he complained to the by-standers and later, to an officer, who took all the parties to the station.

The defendant testified, "I looked across at him and he looked at me on my side. He came across the street, and when he got a few feet of me he said, 'How do you do?' I said 'How do you do?' He says, 'You and I have met before, hav'n't we?'"

She also says she told him they had not met before, but he insisted they had, and accused her of taking $20 from him, on a previous occasion, and that she told him, "We will go right to the police station now and settle it."

She further says they went right into the hallway and argued there about the matter, but she denies there was any money handled there and denies that she took any money. She admits, however, that Evans complained to a sailor on the street that she had taken his money, and called a cab in which the three rode together to the police station.

The principal contention of plaintiff in error is that the judgment is against the weight of the evidence. We do not think the record calls for a reversal on that ground. While neither Evans nor defendant give a frank account of the circumstances attending the transaction, we think there is no reasonable doubt that defendant got his money.

Plaintiff in error claims that the offense proved was grand larceny, because the testimony for the people was to the effect that there was $100 in the roll of money taken. Therefore it is argued the Municipal Court had no jurisdiction of the offense, and the motion in arrest of judgment should have been granted, citing People v. Whitman, 243 Ill. 471. The information here is unlike the one which was held defective in that case. Moreover, as the State points out in this case, the court may have found that the amount taken was only $15, thus giving the defendant the benefit of any doubt. If so, she would have no ground for complaint.

The judgment will be affirmed.

AFFIRMED.

25825

ALICE M. GREENLEAF and IDA GREENLEAF, as executrices of the last will and testament of SARAH A. GREENLEAF, deceased,
Appellees,

vs.

FRANCES LOEFFLER, individually and as executrix of the estate of WILLIAM LOEFFLER, deceased, and FRANK LOEFFLER,
Appellants.

216 I.A. 634

INTERLOCUTORY.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver of certain premises. The proceeding in which the appointment was made was in the nature of a creditors bill based on a judgment against William Loeffler and others, which judgment had been allowed as a claim against the estate of said William Loeffler by the Probate Court of Cook County.

The real estate for which the receiver was appointed is claimed by certain defendants. The complainant alleged that the title had been transferred by the deceased a few days before his death and in fraud of his creditors. The order appointing the receiver was entered October 14, 1919, after answer and notice.

It is admitted the order was erroneous because it neither required a bond by the complainants to defendants nor excused giving of it "for good cause shown" as required by the statute. Jones & Addington's Annotated Statutes, Vol. 2, page 1686; Hurd's Revised Statutes, 1917 Edition, page 203.

Appellees claim, however, that this error was cured by an order entered October 30th thereafter, which provided

that -

> "in lieu of the receiver heretofore appointed by order of this court, entered on the 14th day of October, 1919 * * be and is hereby appointed receiver * * it is further ordered, adjudged and decreed that the complainants give bond to the defendants Frances Loeffler and Frank Loeffler in the penal sum of 2,000.00 and no/100 dollars, with sureties to be approved by this court, conditioned to pay all damages, including reasonable attorneys' fees sustained by reason of the appointment and acts of said receiver in case the appointment of such receiver is revoked or set aside.
>
> And it appearing to the court that the complainants are non-resident of the State of Illinois, and that it will require some time to obtain said last mentioned bond, and it further appearing to the court that the said Frank F. Tollkuehn has heretofore been and now is collecting said rents, issues and profits of said real estate for said Frances Loeffler and said Frank Loeffler, and that no injuries will be sustained by said defendants if the bond required by the statute before the appointment of a receiver is not filed at once, and it further appearing to the court that due notice has been given of this motion, and the court upon full hearing being of the opinion that a receiver ought to be appointed without such bond being required to be filed at once, it is therefore ordered, adjudged and decreed that the complainants be, and they are hereby given thirty days time from the date of the entry of this order in which to file said bond heretofore ordered. * * "

It is apparent, we think, that the order of October 30th is also erroneous. It has been held in several cases that a provision in the order appointing a receiver, that the bond to be given by the complainant shall be filed and approved at a later date, is not a compliance with the statute. Ayres v. The Graham Steamship C. & L. Co., 150 Ill. App. 137; Gibberman v. Stangel, 208 Ill. App. 298; Auguste H. Schoenecke v. Chicago Title & Trust Co., 178 Ill. App. 387; Lydia M. Vluk v. Edwin Phelps et al., 177 Ill. App. 95; Spry Lumber Co. v. Hardin, 172 Ill. App. 86; Mason v. Hooper, 166 Ill. App. 537.

Under the provisions of the statute the court had the power for good cause shown, upon notice and full hearing, if it was of the opinion that a receiver ought to be appointed without such bond, to so find and order. This the court did not do. The order of October 14th must, therefore, be reversed.

REVERSED.

25826

ALICE H. GREENLEAF and IDA GREENLEAF, as executrices of the last will and testament of SARAH A. GREENLEAF, deceased,
Appellees,

vs.

FRANCES LOEFFLER, individually and as executrix of the estate of WILLIAM LOEFFLER, deceased, and FRANK LOEFFLER,
Appellants.

216 I.A. 634

INTERLOCUTORY.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from an interlocutory order appointing a receiver entered October 30, 1919.

It appears from the order that the appointment purported to be made in lieu of a former appointment by an order entered in the same cause October 14, 1919. An appeal was taken to this court from that order, and it has been reversed. The facts have been stated in the opinion this day filed in that appeal between the same parties, general number 25825.

For the reasons set forth in that opinion this order must also be reversed.

REVERSED.

438 - 24791

JOHN LUSSEM,
Appellee,

vs.

LEROY K. WILSON et al.,
Appellants.

Appeal from
Circuit Court,
Cook County.

216 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree setting aside and declaring null and void an instrument purporting to be the last will and testament of Mary Ann Lussem, deceased, theretofore admitted to probate, and also setting aside and declaring null and void a gift alleged to have been made by her prior to her death. We shall take up the points relied upon for reversal in the order presented in appellants' brief.

1. All of the appellants were named as beneficiaries in said will, and two of them as executrices of the same. While these two as individuals with the other named beneficiaries, were decreed to pay costs they are not taxed with costs as executrices. It is contended that they should have been taxed with costs in their official as well as individual capacity. As such executrices they cannot complain, and their personal interests were such as to justify the discretion of the chancellor under the statute in apportioning the costs as decreed.

2. As complainant, the surviving husband of Mary Ann Lussem, deceased, renounced the benefits under her alleged will, it is claimed that he thereby admitted its validity and was precluded from bringing this suit. No authority is cited in support of this contention, with which we do not agree.

3. On cross examination an expert witness for

complainant, a physician, testified that he charged $10 per hour for his time as a witness. Having so testified we find no error in sustaining objections to these further questions, "How much will that be?" and "Do you expect to get $50 for testifying?"

4. It is urged that the chancellor received incompetent evidence. In a case heard by the chancellor or without a jury, "no improper or immaterial evidence will be presumed to have influenced the court in reaching a decision where there is sufficient proper evidence to justify the judgment." (Kreiling v. Northrup, 215 Ill. 195, 198.)

5. It is urged that there was no evidence establishing undue influence, that a prima facie case of the testamentary capacity of the testatrix was established, and that the decree is contrary to the manifest weight of the evidence. We shall give a brief summary of the evidence bearing on these contentions.

At the time Mary Ann Lussem executed said purported will and testament she was confined to her home with an illness that resulted in her death six days later. She was 72 years of age, and had lived with her husband, John Lussem, in apparent harmony during their marriage of nearly 50 years. By a previous marriage she had a son from whom on his death she inherited about $10,000 which had been given to him by her husband, John Lussem. In fact, most, if not all, of the money and property so purported to be devised, was the result of his labors and accumulations. All of the beneficiaries named in the will were her relatives, either nieces or nephews except one grand-niece and one grand-nephew, LeRoy E. Wilson, son of her niece, Ella M. Wilson.

In December, 1916, the deceased became ill with lobar-pneumonia and was attended by a physician from December 18th until December 26th, when she died. On the 19th her

husband called in said Ella Wilson to care for her. The testimony for appellee was to the effect that she was in such a serious condition on the 20th that a consultation of physicians was had, and an examination by the between 5 and 6 o'clock that evening disclosed an advanced state of the disease, a low physical condition, high fever, pulse and respiration, one lung greatly congested, and an apparently hazy state of mind, and at that time she breathed with difficulty and could speak hardly above a whisper.

On the part of defendants the testimony of the witnesses to the will was that on that same evening between 8 and 9 o'clock (Dec. 20) she came out of her bedroom in a kimono, sat by the table and conversed with those present relative to the provisions of the will for about forty minutes, and then executed the will; that no one was then present except said Ella Wilson, her son, LeRoy Wilson, one Fuller, an attorney procured by LeRoy to draw the will in accordance with memoranda furnished to him by said LeRoy, and one Edwards, an associate of LeRoy in the bank where both were employed, who was called there by LeRoy for the express purpose of being a witness to the will, and bringing with him information from the bank books as to the exact amount of the sick woman's deposit therein, for which she signed a withdrawal slip on one of the banks forms also brought by Edwards. The testimony of Fuller and Edwards tended to show sanity on her part and freedom from anything in the nature of undue influence.

The testimony of the physicians attending her on that evening, however, was to the effect that her physical condition was too low to permit of any such interview as testified to by said witnesses to the will. There was some testimony by them and also by a medical expert, bearing on her mental condition, that perhaps was incompetent. Disregarding it, however, we think there was sufficient evidence from the facts and circumstances

attending the procuration, preparation and execution of the will to support the conclusion of the court that it was obtained under undue influence. The evidence tends strongly to show that she remained in bed under the progressive development of the disease from December 19th until she died, six days later, and that she was induced through the influence of her relatives while in such feeble condition to sign a will wholly for their benefit except for the amount of $5 left to her husband. Although he was shown to be in or near the building at the time of its execution he had no knowledge of the will and remained ignorant of its existence until it was presented for probate. There was further evidence that on the evening the will was executed, as aforesaid, Ella Wilson refused permission to complainant's brother and his nephew to see the patient.

It was said in Cheney v. Goldy, 225 Ill. 394, that "proof of undue influence may be wholly circumstantial and inferential." (p. 400) If the chancellor credited the testimony of the physicians as to Mrs. Lussem's condition two or three hours before the alleged time of execution of the will then all the other attendant circumstances might be deemed sufficient to support the inference that the will was the result of undue influence of those in whose interests it was made, and we would not be disposed to disturb the chancellor's findings on which the decree is based. What was said in England v. Fawbush, 204 Ill. 384, on page 392, is particularly appropriate to the facts and circumstances of this case:

> "Where a will is written, or procured to be written, by a person largely benefited by it, such circumstance excites stricter scrutiny and requires stricter proof of volition and capacity. The proof, required in such cases, must be such as fully satisfy the court or jury that the testator was not imposed upon, but knew what he was doing, and

> what disposition he was making of his property when he made his will. The active agency of the beneficiary of a will in procuring it to be drawn, especially in the absence of those who have at least equal claims upon the justice of the testator, and where the testator is enfeebled by old age and disease, is a circumstance which indicates the probable exercise of undue influence. * * * 'The feebler the mind of the testator, no matter from what cause - whether from sickness or otherwise - the less evidence will be required to invalidate the will of such person.'"

6. It is claimed that there was a completed gift inter vivos made by Mary Ann Lussem after she executed said will. There was evidence that she inquired of said attorney why she could not make immediate disposition of her property, and when told she could by giving her property away during her lifetime signed a withdrawal slip brought by Edwards for the exact amount of her deposit in the bank and said to LeRoy Wilson: "I want you to distribute this property just exactly as my will says." The next morning said Wilson and Edwards brought to her a package containing her securities which she handed back without opening it, telling them to divide it and the money in the savings account as stated in her will, or, as otherwise testified to, "Take this and distribute them according to the terms of the will." LeRoy then took the package and retained it in his possession until December 29th, three days after her death, when he undertook to make a distribution to the several donees. It is contended that this was not a complete gift, and in that we are disposed to agree. We think it is clear that LeRoy Wilson was by such statements made the agent of the donor to deliver the property to the donees, and that his agency was revoked by her death before delivery was made, and that, therefore, no title passed by way of a gift to the donees. (Trubey v. Pease, 240 Ill. 513.)

Regardless, therefore, of the question of the sufficiency of the proof to sustain a finding to the effect that the deceased was of unsound mind at the execution of the will, we think the evidence sufficient to sustain the decree setting it aside as having been procured under undue influence and in setting aside the gift as not having been complete. The decree will be affirmed.

AFFIRMED.

476 - 24830

FRED J. DORNSEIF,
Appellee,

vs.

DAVID LEVI,
Appellant.

216 I.A. 635

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $5000 in an action for slander, entered after a remittitur of $2000 from a verdict of $7000.

Three fires had occurred within one week's time in an apartment building owned by appellant. Appellee was one of his tenants and occupied one of the apartments on the first floor. The first fire was confined to appellee's store room in the basement, where he kept certain lithographs of some value. The last was in an apartment across the hall from appellee's.

The first two counts are predicated on words claimed to have been spoken by appellant at such building in the presence of several persons, including tenants, firemen and policemen, gathered there at the time of the third fire, and it is alleged that they were in response to appellee's saying to appellant, "This is fine protection you are giving us." The words pleaded as given in response are: "Why should I give protection to people who set my house on fire. You are the man that is responsible for this and I repeat it again and again. I deliberately accuse Mr. Dornseif of this and I am good for everything I say, and this is damn plain talk, isn't it sergeant?"

The defamatory words charged in the third count are that in answer to the question, "Do you accuse any one of setting this fire?" appellant answered, "Yes"; and when asked, "Who?" answered, "Dornseif." The pleading contains innuendoes connecting these expressions with appellant and said fire. The words charged as defamatory in the third count were spoken in the course of an examination of appellant held by the State Fire Marshall or his deputy.

Many points are urged for a reversal. We shall refer to only such as are necessary to consider.

It is first urged that there should have been a directed verdict because the occasions of speaking the words rendered them privileged, and there was no proof of actual malice, as required in a case of privilege, the law in such a case not presuming malice. What might be our view had the motion been confined to the second count we deem it unnecessary to state, as there was evidence, we think, tending to support the first two counts. It is appellant's theory that the words spoken on the occasion referred to in the first two counts, were intended for public officials, viz: Policemen and firemen, whose authority was such as to make the words privileged. The evidence does not disclose that the policemen were called upon to exercise their authority in any way, and no privilege was conferred from the fact that the words were used in the presence of firemen who had undertaken to investigate into the origin of the fire.

It is claimed the court improperly admitted, and refused to strike, evidence variant from the alleged defamatory words attempted to be proven. The various expressions referred to are as follows: "Then you are the man that set fire to

this building"; "you are the man that set the place on fire"; "you are responsible for this fire, and I repeat it again"; "you are the man that I accuse of setting the fire and you only; you are the man I hold responsible"; "I accuse you of burning this building and I repeat it." Appellant urges that these expressions at best were merely equivalent to those charged in the first two counts of the declaration, and for that reason were inadmissible. The principal words declared on as defamatory are "you are the man that is responsible for this (fire); I deliberately accuse Mr. Dornseif of this" (fire). They have further significance in relation to the words that preceded them, "Why should I give protection to people who set my house on fire." The rule bearing on this subject as stated in Ransom v. McCurley, 140 Ill. 626, 635, is: "Not that the substance of the words alleged must be proved, but that the words alleged in the declaration, or enough of them to amount to a charge of the particular offense alleged to have been imputed, must be substantially proved." It may be doubtful whether some of these expressions come within this rule when considered with reference to what offense the words declared on impute. But a discussion of them under the technical rule is of no practical avail so long as we feel compelled to reverse the judgment on other grounds. While we cannot read the evidence without concluding that the judgment was excessive, even after the remittitur, yet we think the verdict could not be sustained in the absence of proof of defendant's pecuniary ability. The only proof thereon is that he owned the building referred to, but what it was worth, whether he owned it clear of encumbrance, and what, if encumbered, was the value of his equity, and whether he had any other property or income nowhere appears in the record.

Nor was there proof of loss of reputation, position or money, as charged in the declaration to support claim of special damages. Both the verdict and judgment indicate the inclusion of vindictive damages, and without proof of the pecuniary ability of appellant they cannot stand. (Beeson v. Goddard Co., 167 Ill. App. 561, 573; T. W. & Y. Ry. Co. v. Smith, 57 Ill. 517; Mullin v. Spangenberg, 112 Ill. 140, 146.) We do not agree with appellant that there is no cause of action stated in the declaration, but think the judgment should be reversed and the cause remanded for the reasons stated, and that other errors complained of are not likely to arise on another trial.

REVERSED AND REMANDED.

25346

WILLIAM H. PRUYN, Jr. and
MARY A. PRUYN,
Appellees,

vs.

BANK OF COMMERCE & SAVINGS et al.,
Appellants.

216 I.A. 635

Interlocutory.

Appeal from

Circuit Court,

Cook County.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Bank of Commerce and Savings, one of several defendants to an amended and supplemental bill in chancery, to reverse an interlocutory order of injunction restraining said bank from delivering or otherwise transferring certain negotiable notes in its possession, and also restraining other defendants from assigning other negotiable notes in their possession, all of which notes were executed by complainants to their own order and delivered, endorsed by them, to a broker, one Joseph Baiata, to find purchasers therefor.

Said order was entered after due notice on exhibiting said amended and supplemental bill of complaint as verified.

It appears from the averments of said bill that complainants executed and delivered their deed of trust to the Chicago Title & Trust Co., as trustee, to secure the payment of eight principal notes aggregating $10,000, and seventy-four interest coupon notes evidencing interest thereon; that two of the principal notes were for $2,000 each, due respectively in three and four years from their date, and the remaining six principal notes were for $1,000 each, due five years from their date; that after said notes were delivered to said

Baiata he delivered two of them to the trustees of the American Credit Trust and the other four to said bank as collateral security for his own prior indebtedness, without the knowledge or consent of complainants, and that they are still holding said notes and refuse to return and deliver them to complainants after demand upon them therefor; and that since the filing of the original bill said bank has brought suit in the Municipal Court of Chicago upon four interest coupons that were attached to the four principal notes it holds. Complainants also allege their fear that said notes may be negotiated and that other suits will be brought by the parties now holding them or to whom they may be transferred, thus resulting in a multiplicity of suits.

In accordance with the prayer of said bill said trustees and said bank are enjoined from negotiating or in any manner parting with the possession of any of said notes in their possession and from starting suits at law for recovery thereon until the further order of the court.

Appellants contend that the allegations of the bill do not make it a case justifying the issuance of a temporary injunction against it or a case entitling complainants to equitable relief as against appellants.

We agree with appellant that the bill would not lie merely upon an averment that the delivery of the notes by Baiata to appellant to secure his pre-existing indebtedness, was without consideration. (Manning v. McClure, 36 Ill. 490.)

But the bill contains this allegation.

> "The said Bank of Commerce and Savings were then and there immediately upon their obtaining possession of the said four principal notes with interest coupons, thereto attached, advised and informed through one of their officers and agents that the said notes and interest coupons were not the property of said Joseph Baiata, that they were the property of your orators" etc.

A prior allegation in the bill is in these words:

> "Your orators further allege and represent that immediately upon receiving possession of said four promissory notes, the said Bank of Commerce and Savings were thereupon informed and advised by the attorney for said Baiata that said Joseph Baiata had no right" etc.

It is urged that it may be inferred from the last quoted averment that there was an appreciable lapse of time between the bank's receiving said notes and receiving the information from said attorney, and that the bill in that respect should be construed most strongly against the pleader. But a logical construction of the other averment is that the bank received information of the same character from another source at the very time it obtained possession of the notes.

It is urged that if appellant is not a bona fide holder of the notes then appellees have a complete remedy at law by pleading a want of consideration as provided by statute. (Ch. 98, par. 9, Hurd's R. S., (1917).) The main relief sought by the bill is to set aside the deed of trust as a cloud on the title to premises conveyed thereby. The basis of it is that the makers had not parted with their title to the notes which the deed secures and which the bill seeks to cancel. Such a proceeding being one cognizable only in a court of equity and defendants being proper parties thereto there can be no question of the court's jurisdiction to determine the incidental legal question whether appellant was a bona fide holder of the negotiable instruments, which lies at the very basis of the equitable relief sought. Having acquired jurisdiction for one purpose a court of equity acquires jurisdiction for all purposes and will do full and complete justice between the parties and determine all their rights. (Wehrheim v. Smith, 226 Ill. 846.)

It is further contended that it is not sufficient to allege that complainants fear the transfer of said notes and the institution of further proceedings at law thereon. The notes being negotiable and given as collateral security, and the makers thereof having refused to pay the matured coupons, by reason of which suits have already been brought, a sale of such notes to satisfy the debt for which they were given as collateral, and further suits thereon, if not foreclosure proceedings may reasonably be expected to follow. We think such circumstances furnish sufficient ground for such a fear without further allegations, and that as such suits will involve the same question that must be adjudicated in this proceeding, namely, whether complainants have parted with title to such notes, the bill states sufficient grounds for equitable jurisdiction and the right to such order.

AFFIRMED.

1 - 23665

PETER A. BADORF,
Plaintiff in Error,

vs.

JOSEPH F. EBERT and WELLS FARGO EXPRESS COMPANY, a corporation,
Defendant in Error.

Error to
Municipal Court
of Chicago.

216 I.A. 635

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 20, 1917, in the Municipal Court of Chicago, plaintiff commenced a fourth class action in replevin to recover the possession of a certain diamond ring. The bailiff took the ring under the writ and delivered it to plaintiff. A trial was had before Judge Harry P. Dolan, one of the judges of said court, and at its conclusion the court entered a finding that the right to the possession of the property was not in the plaintiff. On July 7, 1917, judgment on the finding was entered against plaintiff and a writ of *returno habendo* awarded. On July 21, 1917, plaintiff prayed an appeal from the judgment order, which was allowed, conditioned on his filing an appeal bond in the sum of $2000 within 30 days, and he was given 60 days time within which to file a bill of exceptions. He did not perfect his appeal by filing the bond within the time allowed, but on the sixtieth day after July 21, 1917, to-wit, on September 19, 1917, he presented a stenographic report of the proceedings had on the trial to Judge Wells M. Cook, another of the judges of said court, and said judge marked the same as follows: "Presented to me for signature in the absence of Judge Harry P. Dolan, this 19th day of September, A. . 1917. Wells M. Cook, Judge." On September 28, 1917, Judge Dolan signed the usual certificate to said stenographic report "*nunc pro tunc* as

of September 19th A. D. 1917," and on the following day, September 29th, entered an order of record that "the Bill of Exceptions herein be and it is hereby approved and ordered filed this date, nunc pro tunc as of September nineteenth (19th) A. D. 1917," and the same was filed on said day. On October 1, 1917, plaintiff sued out this writ of error and the transcript of the record (from which the above facts appear) was filed with the clerk of this appellate court.

Afterwards in this court Ebert, one of the defendants in error, made a motion that said stenographic report be stricken from the transcript and that the judgment be affirmed, which motion was reserved to the hearing.

Under the rulings of the Supreme Court in People v. Rosenwald, 266 Ill. 548, and of this appellate court in Koecel v. Wolfson, No. 24568, opinion filed October 10, 1919, we feel constrained to grant the motion to strike.

In the Rosenwald case, the trial judge was Harry Olson of said Municipal Court, and the time for presenting the bill of exceptions expired on October 11, 1914. It was presented to another judge of that court and he marked it "presented this 10th day of Oct. 1914. - Jacob H. Hopkins, Judge." On October 21st, said trial judge signed the usual certificate "nunc pro tunc as of October 10, 1914." In that case it is said (p.555): "If a nunc pro tunc order is entered there must be sufficient in the record itself to show affirmatively that the trial judge was authorized, under the law, to enter such order. This bill does not show on its face, affirmatively, why Judge Hopkins made the entry that he did on the transcript of record or the authority by which Judge Olson entered the nunc pro tunc order."

In the present case the transcript does not show on its face, affirmatively, the authority by which Judge Dolan

entered the nunc pro tunc order. It does appear that Judge Cook marked the stenographic report as presented to him "in the absence of Judge Harry P. Dolan." It is decided in the Rosenwald case that, under the provisions of section 81 of the Practice Act, the mere absence of the trial judge does not authorize another judge to sign the bill of exceptions, and that if such other judge merely marks the bill as presented, such entry would be sufficient to furnish a basis for a nunc pro tunc order by the trial judge in signing the bill, provided it was recited therein that such entry had been made by said other judge while he was presiding in said court and that "due diligence had been shown by appellant in seeking to have the bill presented to the trial judge before it was presented" to such other judge. In the present case there is no such recital in the nunc pro tunc order entered by Judge Dolan, and such fact does not otherwise affirmatively appear.

Accordingly, the motion to strike the stenographic report from the transcript is allowed, and, as none of the assignment of errors are based upon the common law record, the judgment of the Municipal Court must be affirmed.

AFFIRMED.

57 - 24962

A. SMITH,
Defendant in Error,

vs.

SEYMOUR H. NEUMANN,
Plaintiff in Error.

216 I.A. 635

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The defendant, Seymour H. Neumann, by this writ of error seeks to reverse a judgment for $681 rendered against him, after verdict, in the Municipal court of Chicago, in a fourth class action in tort.

In plaintiff's statement of claim, filed April 25, 1917, he alleges in substance that his claim is for damages to his automobile truck and for loss of the use of the same through the negligence of defendant and his agents on November 29, 1916, at the intersection of Ashland boulevard and Adams street in Chicago; that his truck was being driven in an easterly direction on West Adams street; that defendant owned and controlled an automobile which he was then and there by himself, his servants and employees, driving in a northerly direction on Ashland boulevard; that defendant by himself, his agents and employees, so negligently drove and operated said automobile that without any fault of plaintiff it collided with plaintiff's truck, whereby said truck was greatly damaged and plaintiff was without the use thereof for three weeks. The defendant entered his appearance by an attorney and subsequently filed an affidavit of merits in which he denied that the accident occurred through his negligence or that of his agent, denied that plaintiff had suffered the damages to his truck as stated, and alleged that said collision occurred wholly by reason of plaintiff's negligence. On May 23, 1918, the court

entered an order to the effect that, by stipulation, the case be consolidated with the cause of Neumann v. Smith, No. 488,480, in said Municipal court. On the day the case was called for trial, Monday, June 17, 1918, the court, by agreement of the parties, vacated and set aside said order of consolidation. On Saturday, June 15th, an attorney, retained that day by defendant, served notice on plaintiff's attorneys that on Monday, June 17th, at the opening of court, he would enter his appearance as attorney for defendant, present the withdrawal of the appearance of defendant's former attorney, and move for a continuance of the case. On said Monday morning, June 17th, said newly retained attorney was substituted as defendant's attorney. He then moved for a continuance, supporting the motion by his own and defendant's affidavits. After argument the court denied the motion for a continuance. Thereupon defendant's attorney moved for leave to file an amended affidavit of merits by 2 o'clock in the afternoon, which motion was granted. Thereupon a jury was empanelled and during the morning some of plaintiff's witnesses testified. At 2 o'clock in the afternoon defendant's attorney presented defendant's amended affidavit of merits, in proper form, in which defendant denied that plaintiff's truck had been damaged, or that he had suffered the loss of the use thereof, "through the negligence and carelessness of the defendant or his agents;" denied that defendant, his agents and employees, were driving an automobile in a northerly direction on Ashland boulevard as alleged; denied that defendant was responsible for any damage to plaintiff's truck; and alleged as a further matter of defense that "he loaned his automobile to one William Lidke in the latter part of September, 1916, and that said William Lidke, without defendant's knowledge, permission or consent, loaned said automobile to one Oscar Osberg, and that said Oscar Osberg was driving the said automobile, without the knowledge or consent of

this defendant, at the time of said collision, and that neither the said William Lidke or Oscar Oeberg was the agent or employee of this defendant before, at the time or since the time of the accident." Plaintiff's attorney objected to the filing of the amended affidavit of merits on the ground that it presented an entirely new defense, which had not previously been disclosed, "after the statute of limitations has run." After argument the court refused to allow defendant to file said amended affidavit of merits, saying: "You can't come in after the statute of limitations has run and file an amended affidavit of merits setting up a different defense." The only witness for the defense was the defendant himself. He testified that he was not in the collision on November 29, 1916, and did not then have his automobile at the place of the accident. Although he was asked proper questions, he was not allowed by the court to give any testimony relative to the affirmative defense mentioned in said amended affidavit of merits. The jury found the defendant guilty and assessed plaintiff's damages at the sum of $681, and judgment against the defendant was entered on June 28, 1918.

Defendant prayed an appeal to this Appellate court, which was allowed upon his filing a bond in thirty days, and he was given time to file a bill of exceptions. He filed his appeal bond in the Municipal court within the required time and the same was approved; subsequently he filed his bill of exceptions. He did not perfect his appeal in this Appellate court but on November 21, 1918, he sued out this writ of error.

On June 19, 1919, plaintiff filed a motion in this Appellate court suggesting a diminution of the record and for leave to supply same. He tendered a duly authenticated copy of a certain statement of claim, sworn to by Seymour F. Neumann, filed in the Municipal court in the cause Neumann v. Smith, No. 488,480,

which cause plaintiff claimed was consolidated with the present case. Counter suggestions were filed by defendant. Inasmuch as it appeared from the record in the present case that said order of consolidation had been vacated and set aside during the trial of the present case, and that said statement of claim was not properly a part of the record of the present case, plaintiff's motion was on July 3, 1919, denied.

Among the various points urged by counsel for defendant for a reversal of the judgment is the point that the trial court abused its discretion in not allowing defendant, at the time the case was called for trial, to file an amended affidavit of merits, in which he presented a defense additional to that mentioned in his original affidavit, and in not allowing defendant to introduce testimony in support of that additional defense. We are of the opinion that under the facts and circumstances of this case the point is well taken. The defense, if sustained by proof, is a good defense. (Arkin v. Page, 287 Ill. 420; Fritz v. Hochspeier Co., 287 Ill. 574.) It seems that the trial court finally refused to allow the amended affidavit of merits to be filed on the ground that the "statute of limitations has run." But it had not. (Sec. 15, Limitations Act.)

And we do not think that there is any merit in the suggestion of counsel for plaintiff that this court is without jurisdiction to review the case upon this writ of error.

For the reasons indicated the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

81 - 24938

JOHN L. BOBO,
Defendant in Error,

vs.

ARTHUR B. McGOID,
Plaintiff in Error.

216 I.A. 636

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff in the trial court sued to recover money which he claimed was due him by virtue of a certain written agreement relative to certain stock. At the conclusion of the hearing the court instructed the jury to find the issues for the plaintiff and to assess his damages at the sum of $5,456.66. The jury returned a verdict accordingly, and on July 13, 1917, the court entered a judgment for said amount against defendant, and defendant was given sixty days time within which to file a bill of exceptions. This time expired on September 11th. No order was entered on or prior to this date extending the time. On September 12th, one day after the expiration of said sixty days, on motion of defendant, the court ordered that the time for filing the bill of exceptions be extended until September 15th. Defendant presented the bill of exceptions to the trial Judge and it was marked by him "presented," on September 14th. The trial Judge signed it on October 20, 1917, and on the same day entered an order that it be approved and signed "nunc pro tunc as of September 14, 1917," and filed by the clerk as of that day.

After the transcript of the record was filed in this court counsel for plaintiff filed a motion to strike said bill of exceptions therefrom and to affirm the judgment. This motion was reserved to the hearing.

The motion must be granted. The court was without

jurisdiction to enter the order of September 12, 1917, extending the time to file the bill of exceptions until September 15th. (Richter v. Chicago & Erie R. Co., 273 Ill. 625, 627; People v. Irwin, 283 Ill. 51, 54). And none of the errors assigned and argued arise on the common law record.

Accordingly, it is ordered that the bill of exceptions be stricken from the transcript and the judgment of the Circuit court be affirmed.

AFFIRMED.

364 - 24716

836

216 I.A. 636

MERCHANTS LOAN AND TRUST COMPANY, et al,	Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.		
JOHN C. TRAINOR,	Appellant.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This proceeding was in the nature of a distress for rent, begun by the plaintiffs, Merchants Loan & Trust Company, et al, in the Municipal Court of Chicago, to recover the sum of $462.00 alleged to be due from the defendant John C. Trainor, for rent of an office occupied by him in a building belonging to the estate of Lambert Tree, for which the plaintiffs were trustees. The claim covered a period of 11 months at $42 per month. By way of set-off the defendant claimed that he was entitled to an allowance of $80 for a period, at the beginning of the term of his lease, during which he did not have the use of his office owing to the progress of alterations and repair work, and also that he was entitled to an allowance of $500 for legal services rendered the estate. The services which the defendant claimed to have rendered were in connection with two matters which were pending about the year 1913. These proceedings were began in March, 1918.

The issues were submitted to the court without a jury and there was a finding in favor of the plaintiff to the extent of $382. The court allowed the defendant's set-off as to the $80 item and disallowed it as to the $500 item.

The only question presented on this appeal by the defendant involves the action of the court in disallowing his claim for $500 for the alleged legal services. We have carefully examined the evidence in the record on that question and in our opinion it cannot be said that the finding of the trial court was against the manifest weight of the evidence.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

389 - 24742

JACOB WOLFLIN,

Appellee,

vs.

CITY OF CHICAGO, et al

On appeal of JAMES TINLEY and ARTHUR BAIRSTOW,

Appellants.

216 I.A. 636

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants Tinley and Bairstow seek to reverse a judgment for $2,000 recovered by the plaintiff Wolflin, in a suit brought by him against the City of Chicago and the Appellants. The suit was for personal injuries which the plaintiff alleged he suffered as the result of falling into an excavation at the southwest corner of Lawrence and Monticello avenues, in the City of Chicago. The issues were submitted to a jury and they found the defendant City of Chicago not guilty and the appellants guilty. The defendant Tinley had the general contract for the erection of a building at the location referred to. He sub-let the excavating and cement work contract to the defendant Bairstow and the latter sub-let the excavating to one Flood.

In support of this appeal the only point urged

by the appellants is that the trial court should have held that under the evidence the plaintiff was guilty of contributory negligence as a matter of law and that the court erred in refusing to direct a verdict for them on that ground and also that the verdict is against the manifest weight of the evidence on the question of the plaintiff's exercise of due care.

The plaintiff suffered the injuries complained of between six and seven o'clock on the evening of December 10, 1915. The excavation in question came within a few inches of the sidewalk on the Lawrence avenue side which was the front of the lot and it was 25 or 27 feet in width. There was a space of nine feet between the sidewalk on the Monticello avenue side and the east side of the excavation. The sidewalk along Lawrence avenue was ten to twelve feet in width. There were "ordinary flame" gas street lamps on the southeast and northwest corners of the intersection but none on the southwest corner. The excavation in question had been begun two or three days previous to the accident.

The plaintiff lived a few blocks away from the location of the excavation but he testified that he had not had occasion to walk by that corner after the excavating work was begun and knew nothing about it until he suffered his fall on the evening of December 10th. He testified further that on that evening he was walking west on the south side of Lawrence avenue, "on the inside of the sidewalk"; that after he passed Monticello avenue, I was wiping one of my eyes, having received a speck of

dust in my eye"; that after he had passed the corner curbline thirty or thirty-five feet he struck an obstruction on the sidewalk with his shoulder and left leg; that he was walking at an ordinary gait; that he did not see the obstruction before he struck it; that he lost his balance and in trying to recover his balance he fell backwards into the excavation which was so deep that when some men came to help him "the top of the excavation was higher than some of their heads." On cross examination he testified that he had his handkerchief out and that he continued to walk as he was wiping his eye; that "striking the obstruction jarred me and I stepped back from it, and not knowing what I struck, and in doing so I lost my balance and went over into this excavation." One Jones testifying for the plaintiff said that the excavation was abo t six feet deep; that as he passed this place on his way to work on the morning of the tenth, there was a board about 15 feet long "on the west end of the excavation * * * resting on a brick layer's trestle. From the end of that board to the corner there was no barricade at all"; that the east "10 or 15 feet, maybe 20 feet," of the excavation was without a barricade; that as he passed by that evening about half past six o'clock he did not notice whether there was any barricade there. One Rieger, testifying for the plaintiff, said that the excavation was five or six feet deep; that he was called to the place of the accident after it happened; that the eastern part of the excavation was not barricaded; that the barricade consisted of one plank about twelve feet ng and two or three horses; that the barricade ex-

tended from the west end of the excavation toward Monticello avenue, "as far as that one board went"; that there was a horse at each end of the board, supporting it; that the corner was dark. One Fromm, for the plaintiff, testified that he was walking along the north side of Lawrence avenue when a boy told him a man had fallen into the excavation across the street, whereupon he ran over there and jumped down into the hole from the Lawrence avenue sidewalk; thatit was a dark night; that there was a barricade in front of the western part of the excavation consisting of a plank about 15 feet long, the east end of which rested on a horse and the west end of which lay on the ground; that the horse was about five feet long and stood at about the center of the excavation and with its length extending east and west; that he found plaintiff lying in the excavation east of the horse; that he jumped into the excavation from the Lawrence avenue sidewalk near the east end of the excavation and east of the horse referred to. One Guthrie, for the plaintiff testified that he also jumped down into the excavation from the Lawrence avenue sidewalk; that as he stood in the excavation the top was about on a level with the top of his head; that he jumped into the excavation ten or twelve feet from the corner; that the plaintiff was lying in the excavation east of the middle; that there was no barricade in front of the excavation at the point where the witness jumped into it which was ten or twelve feet west of the west line of the Monticello avenue sidewalk. It was conceded that there were

no lights about the excavation. One Dickey testified for the plaintiff that he assisted in removing the plaintiff from the excavation, carrying him out on a board which he procured from his store nearby; that he saw no boards lying about where the plaintiff was; that it was dark and they had to get a lantern to see to get the plaintiff out; that the excavation was over six feet deep; that the plaintiff was lying a little east of the middle of the excavation.

The defendant Tinley testified that his office was on the north side of Lawrence avenue almost opposite the excavation in question; that the excavating work was begun on the morning of the 9th and on the evening of the 10th the bottom of the excavation was a little over three feet below the sidewalk; that he went over and saw what the situation was about half past five o'clock on the evening of the 10th; that there was a barricade across the Lawrence avenue front of the excavation consisting of three horses; each about five feet high, and two and a half feet in width, placed at the inside of the sidewalk, one being located about the center of the excavation, one a little to the east and the other a little to the west of the east and west sides of the excavation, with planks placed between the horses and resting on the cross pieces and also two other planks, one on the east side and one on the west side with their inside ends resting on the outside cross pieces of the east and west horses and their outside ends resting on the ground, these two planks inclining somewhat to the south.

The contractor Flood, testifying for the defendant said that the excavating work began "about the 9th"; that when the men stopped work on the evening of the 10th, the excavation was between two and a half and three feet deep at the Lawrence avenue end; that there was a barricade left there when the men stopped work on the evening of the 10th. This witness corroborated the defendant Tinley as to the nature and extent of the barricade saying that it extended two feet east of the east side of the excavation. Three workmen, employees of the contractor Flood, testified for the defendants and in substance corroborated Tinley and Flood as to the depth of the excavation when they stopped work on the evening of the 10th and the extent and nature of the barricade which they put up at that time, and one or more of them testified that the same sort of a barricade was placed along Lawrence avenue front of the excavation on the evening of the 9th.

On this evidence, our opinion is that the trial court did not err in refusing to hold that the plaintiff was guilty of contributory negligence as a matter of law and further that the verdict is not against the manifest weight of the evidence on the question of the exercise of due care by the plaintiff. In contending the contrary, the appellant defendants have called our attention to a number of cases which are not in point as they have to do with situations in which plaintiffs were held not to have exercised due care inasmuch as they had deliberately put themselves into places of known danger or which they should have known were dangerous and the danger of which they would

have observed if they had looked about them. That is not at all the situation involved here. This was a dark corner. There were no warning lights on the barricade or about the excavation. We cannot say that the plaintiff was guilty of contributory negligence because he proceeded to walk along the sidewalk at his ordinary gait as he wiped one of his eyes with his handkerchief. He had no knowledge of any surrounding danger or any obstruction, and had a right to presume that the entire sidewalk was reasonably safe for travel. Strehmann v. City, 93 Ill. App. 206; Village of Wilmette v. Braehle, 110 Ill. App. 356; City of Ottawa v. Hayne, 114 Ill. App. 21; City of Chicago v. Babcock, 143 Ill. 358; City of Beardstown v. Smith, 150 Ill. 169; City of East Dubuque v. Burhyte, 173 Ill. 553; City of Spring Valley v. Gavin, 182 Ill. 232. If this were not true as a matter of law, so far as the appellant defendants are concerned, the question was one of fact to be determined by the jury as to them. Brun v. Nacey Co., 267 Ill. 353. We cannot say from the evidence in this record that the verdict is not supported by its preponderance in this regard. Brennan v. City of Chicago, 170 Ill. App. 252.

Finding no error in the record, the judgment of the Superior Court is affirmed.

AFFIRMED.

412 - 24765

FRANK KORDELEWSKI,

Appellee,

vs.

WESTERN PACKING & PROVISION COMPANY,

Appellant.

216 I.A. 636

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendant from a judgment for $1,375 recovered by the plaintiff, based upon a verdict finding the issues in his favor, in a suit for personal injuries. The declaration contained two counts. The first one was the usual common law negligence count. It made no reference to The Workmen's Compensation Act. The second count contained similar allegations to those contained in the first and it also included a paragraph in which it was alleged that at the time the plaintiff received his injury the defendant had "Elected not to come under the Act commonly known as The Workmen's Compensation Act. * * * and the defendant refused to provide and pay compensation to its employees, in accordance with the provisions," of the Act. The defendant filed a plea of the general issue.

The contention of the defendant that the allegations of the declaration are not sufficient to support the verdict and judgment cannot prevail. The allegation

in the second count that defendant had, at the time of plaintiff's alleged injury, "elected not to come under the Act commonly known as The Workmen's Compensation Act," was a proper allegation. It was not necessary for plaintiff to allege evidentiary facts,- that defendant had filed a notice of rejection of the Act with the Industrial Commission or that it had complied with the provisions of the Act in regard to giving notice to employees personally or posting notices in the proper places. In the second count of his declaration, the plaintiff did not plead a legal conclusion but an ultimate fact and under that count the evidentiary facts going to establish the ultimate fact alleged were properly held admissible by the trial court. Kleet v. Southern Illinois Coal & Coke Co., 197 Ill. App. 247; Hughes v. Eldorado Coal Mining Co., 197 Ill. App. 263.

In support of this appeal the defendant also contends that there was not sufficient competent evidence to establish that defendant had filed notice of rejection of the Act with the Industrial Commission and had posted a copy of said notice so as to establish a rejection of the Act as therein provided. In our opinion the evidence as to both of those facts was such that we cannot disturb the finding of the jury.

The plaintiff was injured April 21, 1915. From the files of the Illinois Industrial Commission an original communication was produced and introduced in evidence. One Gallagher testified that in 1913 he was assistant manager of the defendant and that the communication in question was signed by him and mailed. This communication was

addressed to "Mr. David Rose, Secretary Industrial Accident Boards, Springfield, Illinois." and read as follows: "This is to advise you that we do not desire to pay compensation as provided for in the Illinois Compensation Act of 1913, i.e. House Bill, 841 as passed. Kindly advise us as to whether our former election under the late law not to pay compensation can be held valid under the present law. Kindly acknowledge receipt and advise us as to your ideas of the same." Just above the signature "D.J. Gallagher," were the words, "Western Packing & Provision Co." One Carey, Security supervisor for the Industrial Commission of Illinois, who produced this communication from the files of the Commission, testified that he first saw it there some time in December, 1913, and that it had been kept there ever since. This communication constituted sufficient notice to the Industrial Commission to take defendant out of the operation of the Workmen's Compensation Act, (Willett Co. v. Industrial Commission 287 Ill. 487) provided the other provisions of sec. 2 of the Act were complied with.

On the question of the posting of notices to the effect that defendant had elected not to be bound by the provisions of the Act, one Suchowalki, an employee of defendant was asked if he ever saw signs posted up that defendant was not under the Compensation Act and he said he had: On cross examination he said these had to do with directions about the uses of the different machines, This witness was Polish and in the course of the cross-examination it became necessary to use an interpreter. He testified near the close of a court session on Friday. On the following Monday this witness again took the stand and produced a

notice which he said he had procured from the door of the blacksmith shop at the defendant's plant on the previous Saturday; that he had seen the same kinds of notices posted elsewhere through the plant including the department where plaintiff had been employed "about a year before he was hurt, and they were up all the time." He said he did not think he had been asked about this card on his previous examination. The plaintiff testified he had seen these notices about the plant since about two years before he was hurt. The notice produced by the witness Suchowalki was headed, "Notice to Employees" and it notified them that the defendant had elected not to pay compensation for injuries or death suffered by its employees, according to the provisions of the Workmen's Compensation Act. The witness Gallagher testified that notices that the defendant would not be bound by the Compensation Act had been posted but he could not say whether it was before the accident; that they were put up after an investigator named O'Brien came out to the plant and called their attention to the fact that there were no notices posted,- it was at the time of some accident but he did not know whether it was this accident; that one Kircher was present at this conversation the witness had with O'Brien; that he thought the notices were posted "along in April, 1915"; that he did not remember any accident in that month or about that time other than the one involved here.

Kircher testified for defendant that he had never seen any notice similar to the one Suchowalki had produced; that "he had typewritten notices posted * * * stating that we had waived the Compensation Act but they were posted

after Kordelewski was hurt * * * about May or June, 1915, * * * an investigator came out after the accident and called my attention to the fact that the notices were not posted." This witness was the Superintendent for the defendant.

One Lacher testified that he was timekeeper for defendant in April 1915 but was not in defendant's employ at the time of this trial; that there were no notices about the Compensation Act posted in the plant before plaintiff was hurt but after that time "I remember seeing and reading Plaintiff's Exhibit 1 (the card produced by Suchowalki) and there were other notices like that. I don't remember seeing any typewritten copies."

O'Brien testified that he was a lawyer and went to defendant's plant to make an investigation of this accident in June, 1915; that he observed there were no notices about the plant regarding the Compensation Act; that he called the defendant's attention to this and gave them a notice similar to Plaintiff's Exhibit 1. He further testified, "When I was at the Western Packing & Provision Company plant I saw some typewritten notices regarding the machines and the operation of the machines."

The plaintiff was permitted to testify and we think not improperly, that after he recovered from his injury he went over to see his superintendent at defendant's plant and he said, "We don't long under the Compensation Act, we are here the same as we were before."

It is not surprising that the jury concluded from all this testimony, not only that the defendant had notified the Commission that they had elected not to be bound by the act but

Act, but also that they had posted notices to that effect before the plaintiff was injured.

We find no error in the record and the judgment of the Superior Court is affirmed.

AFFIRMED.

244 - 24595

MARY A. SEARLES,

Appellee,

vs.

WESTERN LIFE INDEMNITY COMPANY, a corporation,

Appellant.

216 I.A. 636

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Mary A. Searles brought suit in the Municipal Court of Chicago against the Western Life Indemnity Company to recover $1313.40. There was a finding and judgment in her favor for the amount of her claim to reverse which defendant prosecutes this appeal.

There is no dispute as to the facts in this case which, so far as material, are as follows: May 5, 1910, the Knights of Honor, a fraternal insurance society, issued its benefit certificate to Felix Searles, husband of the plaintiff. Afterwards, September 22, 1915, the Continental Beneficial Association, a Pennsylvania corporation, also a fraternal insurance society, took over the certificate issued by the Knights of Honor and assumed the liabilities thereunder, and afterwards issued its own certificate in lieu thereof. The Continental Beneficial Association was licensed to do business in this State in 1912 and thereafter conducted its business here until November 17, 1916, when the Superintendent of

Insurance of this State filed a bill in the Superior Court of Cook County for the appointment of a Receiver of the local assets of the Association and for a writ of injunction to restrain it from removing its assets from this State. The writ was awarded and the Chicago Title & Trust Co. appointed receiver. On November 28, 1916, a bill was filed in Pennsylvania to wind up the affairs of the Beneficial Association and for the appointment of a receiver, and David Phillips was there appointed receiver. He afterwards filed a bill in the Circuit Court of Cook County praying for an ancillary receiver. This proceeding was enjoined by an order entered in the suit in the Superior Court. An appeal was taken to this court where the order of the Superior Court was affirmed; People v. Continental Beneficial Association, 204 Ill. App. 501. After the case was heard on its merits and a final decree entered, another appeal was taken to this court where the decree was affirmed, People v. Continental Beneficial Ass'n. 212 Ill. App. 424. A writ of error was afterwards sued out of the Supreme Court to reverse the judgment of this court, but upon hearing the judgment of this court was affirmed, People v. Continental Ass'n. 289 Ill. 40.

On November 29, 1916, David Phillips as Receiver of the Association entered into a reinsurance contract with the defendant company. On November 25, 1916, Felix Searles who lived in New York State, mailed his check to the Continental Beneficial Association at Chicago for $23.30 in payment of his December dues or

premium. When the check reached Chicago it was turned over by the postal authorities to the Title & Trust Company as Receiver. Shortly thereafter during the fore part of December a representative of the defendant company called on the Title & Trust Company and informed it of the reinsurance contract which the defendant had entered into with the Pennsylvania receiver, and made an endeavor to secure from the Title & Trust Company the remittances for dues or premiums that had been made by a number of policy holders in the Continental Beneficial Association. The Title & Trust Company refused to turn over the moneys received without an order of court. Afterwards an order of court was entered authorizing the Title & Trust Company to inquire of the persons who had sent their premiums to the Beneficial Association, and which were held by the Title & Trust Company, whether they wished to have them returned or to have them turned over to the defendant company under the reinsurance contract. The Title & Trust Company in accordance with this order wrote the several persons who had sent the premiums and enclosed two forms of postal card with the letter, one directing the Title & Trust Company to return the premium to the policy holder and the other directing it to turn the premiums over to the defendant company. The recipients of the letter and postal cards were requested to sign the cards which expressed their desire and mail it back to the Title & Trust Company. Two days afterwards, on December 20, 1916, the defendant company wrote to these policy holders, including Felix, Searles, calling their attention to the letter

sent by the Title & Trust Company, suggesting that if they wanted to take advantage of the reinsurance contract entered into for their benefit, to sign the proper postal card and return it to the Title & Trust Company. Accordingly Searles signed and returned to the Title & Trust Company the card directing them to turn over the December premium to the defendant, and in the same letter he enclosed a check for $23.30, payable to the order of the defendant company, and requested the Title & Trust Company to turn it over to the defendant company in payment of his January dues. The Title & Trust Company refused to turn over the check for the January dues as requested, but returned the same to Searles. Thereupon Searles, on the 31st of December, remailed the check to the defendant company advising them that the check had been sent to the Title & Trust Company and had been returned by the latter, and that it was in payment of the January dues. The check and letter were received by defendant on Jan. 2'17. On Jan. 4, 1917, an order was entered by the court directing the Title & Trust Company to return the checks to the several policy holders who had requested such return, and to turn over to defendant such premiums as the policy holders had requested. In compliance with this order, the Title & Trust Company on January 12, 1917, turned over a number of premiums, including the Searles check for the December premium, to the defendant company. Afterwards on January 20, defendant returned the two checks to Searles stating that it did not recognize the Title & Trust Company as its agent in any capacity and that since the December pre

premium was not received during the month of December it was too late and, therefore, Searles would not be accepted as a policy holder under the reinsurance contract. On February 3rd following Searles died, and this suit was brought by his widow the beneficiary.

Of course, plaintiff's right to recover arises out of the reinsurance contract taken in connection with the undisputed facts as to what was done in the case. Defendant contends that under the terms of the reinsurance contract Searles could not take advantage of it unless he had paid at least one premium to the defendant company within the time limited by his policy or certificate in the Beneficial Association; that Searles had the entire month of December to pay the December dues but since the dues were not received by the defendant until sometime in January the payment was too late. The contract of reinsurance provided that policy holders to take advantage of it must pay one premium to the defendant company. When on November 29, 1916, defendant entered into the reinsurance contract, Searles, had already, four days before, paid his premium for December. It came into the hands of the Title & Trust Company and shortly afterwards this became known to defendant. The defendant thereupon endeavored to obtain this premium. It had procured a list of the policy holders from the Title & Trust Company, and also a list of those who had paid their current premiums. It wrote Searles suggesting that if he desired to take advantage of the reinsurance contract to authorize the Title & Trust Company to turn over his December premium.

This Searles did and the fact that it required some few days after the first of January for the Title & Trust Company to get the necessary order of court ought not defeat the plaintiff's claim in view of the further fact that the defendant accepted from the Title & Trust Company this premium after the order of court was entered in January. Defendant had also received on January 2, 1917, payment from Searles of the January dues andit never indicated it would not accept him as a policy holder until eighteen days later. We think without going further into an analysis of the reinsurance contract, that we have said sufficient to warrant an affirmance of the judgment.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

252 - 24603

JOHN J. BURKE, doing business under the name and style of Alexander Burke's Sons,

Appellee,

vs.

HARRY L. HAGERMAN, et al

On appeal of GERHARD G. SCHONEBERGER, ELSIE L. SCHONEBERGER and PAUL SCHULTE, personally and as trustee,

Appellants.

216 I.A. 637

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Complainant filed a bill against defendants to foreclose a mechanic's lien for $759.50. After the issues were made up, the cause was referred to a Master who reported in favor of complainant, and a decree entered in accordance with the Master's report, to reverse which this appeal is prosecuted.

The record discloses that the defendant Hagerman was about to construct an apartment building and for that purpose purchased 997,500 brick of the complainant. The brick were delivered and payments were made from time to time until, as complainant contends, there was a balance due him of $759.50. On the other hand defendants claim the balance due was but $270.73. So far as the facts are concerned, the only dispute was as to whether there was to

be a discount of seven per cent allowed on the purchase price of the brick. The Master sustained complainant's contention that there was to be no discount and his finding was approved by the Chancellor. We have read the evidence in the record and think it clear the finding is in harmony therewith. After nearly all of the evidence before the Master had been introduced it developed that complainant was in business with his brothers who were silent partners, and thereupon defendants asked leave to amend their answers so as to set up that the contract for the purchase of the brick had been entered into with the partnership and not with complainant. This motion was denied, and we think very properly so, for it clearly appears that at the time the motion was made it was apparent to everyone that defendants would not be successful in their defense to the case, and they then sought onwery technical ground to avoid the payment of a just claim. In the answers filed and on which the case was on hearing, they expressly admitted that the contract to purchase brick was made with complainant. In these circumstances, defendants should not be permitted to so amend their answer as to contradict what they had theretofore admitted, especially when the amendment sought to be made would not in any way effect the merits of the controversy, viz: that there was a balance due on the purchase price of the brick of $759.50. The motion was a matter to be determined in the exercise of the sound discretion of the court. Drew v. Drew, 271 Ill. 239. We think the Chancellor's ruling was eminently proper.

Another point seems to be that Hagerman was not the owner of the property, but that the defendant Schulte was, and the statement of claim for lien filed, wherein it was stated that Hagerman was the owner, was not proper and, therefore, no lien could be established. It is charged in the bill and the evidence shows that Hagerman was the owner of record at the time of the making of the contract, and this was expressly admitted by the answers filed. There is no semblance of merit in this point. Complainant was clearly an original contractor within the meaning of Sec. 1 of the Mechanic's Lien Law and filed his claim in all respects in accordance with the statute. No meritorious point is made which should in any way defeat the claim. The decree of the Superior Court of Cook County is correct and it is affirmed.

DECREE AFFIRMED.

222 - 24572

E. ARLINE OPP,

Defendant in Error,

vs.

EDWARD B. BRYON, Receiver of the Wabash Railroad Co., a corp.,

Plaintiff in Error.

216 I.A. 637

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, E. Arline Opp, having been injured, when riding in an automobile as a passenger, by a train belonging to the Wabash railroad, brought suit for damages * for her personal injury and recovered a verdict and judgment in the sum of $5,000.00. The first count contains an allegation of general negligence on the part of the defendant in managing the engine and train of cars; the second, that there was no light burning at the rear end of the train of cars; no bell ringing and no warning or notice given of the approaching train; the third, that the engine and train of cars were operated without a watchman to give the plaintiff any warning of its approach and without any gates at the crossing.

The disaster happened at a point where the Wabash tracks, two in number and running parallel, cross a public street known as South Ninth street in the city of LaFayette, Indiana. South Ninth street runs north and south, and the two tracks of the Wabash cross that street running in a northeasterly and southwesterly di-

rection. South Ninth street as it goes south to the railroad tracks is slightly up grade, but the railroad tracks themselves are level. The level area is from 18 to 20 feet wide.

The train of the Wabash which collided with the automobile in which the plaintiff was riding consisted of an engine and nine freight cars and was engaged in a switching operation. At the time in question it was going in a northeasterly direction. It consisted of seven box cars, two loaded coal cars, and the engine, which was attached to the southwestern end of the train. The two loaded coal cars were at the northeastern end of the train and between them and the tender of the engine were the seven box cars.

The crew handling the freight train was made up of Bell, the engineer; McKay, the fireman; Driscoll, the conductor; Kessen and Kline, switchmen. The engineer was, at the time, on the northerly side of the engine and the fireman opposite him; Kessen, one of the switchmen, was on a box car next to the engine; Driscoll, the conductor, was on the box car which was the seventh car from the engine, and Kline, a switchman, was on the northeast corner of the ninth car, a loaded coal car.

The train was being backed in a northeasterly direction on the southerly track. Driscoll and the two switchmen, Kessen and Kline, each had a white lantern. The collision occurred on July 17, 1915 between 9:30 and 10:00 o'clock at night. As the freight train, going northeasterly, approached South Ninth street, Kline, the switchman, who was on the northeast corner of the loaded coal car - according to his own testimony - whistled by

means of putting some of his fingers in his mouth and blowing, and, also, waived his lantern as a signal. The freight train was going about five miles an hour. About 150 feet northeast of the track is South street, which runs east and west and crosses South Ninth street at right angles. At the intersection of those two streets there was an electric arc lamp; and about 300 feet south of the railroad tracks, in the middle of South Ninth street there was another similar lamp. They furnished practically all the light there was in that neighborhood at the time in question. The next street north of South street, parallel therewith, is Columbia street, that also crosses South Ninth street at right angles. The next street north of Columbia is Main street. On the night in question, one Ethel Shambaugh was driving a two seated Studebaker passenger automobile. It had a left hand drive. There were, altogether, five women in the automobile. The plaintiff was seated at the right of the driver on the front seat and, therefore, on the side towards which the freight train - running backwards - was moving. Belle Wood, Grace Wood and Mrs. Shambaugh, the mother of the driver, sat on the rear seat. The automobile was driven easterly along Main street until it reached South Ninth street. It was then turned into South Ninth street and traveled south towards the railroad tracks. The evidence is in conflict as to the speed of the automobile just before and at the time of the collision. Ethel Shambaugh, the driver, said the speed varied from 8 to 12 miles an hour. The witness Sharpe, a school teacher, who at the time was driving an automobile a little more than 60 feet, just back of the one in question, stated the speed to be from 10 to 15 miles an hour

and "possibly a little bit faster" when it was a little nearer the railroad tracks. The witnesses for the defendant described the speed as from 15 to 20 miles an hour; one put it as high as 30 miles an hour. Just prior to reaching the railroad tracks the automobile was on the west side of South Ninth street going south and shortly before reaching the railroad tracks it was turned somewhat to the left into the street railway tracks which were in the center of Ninth street. The automobile passed over the northerly track of the Wabash railroad and then was struck by the northeast corner of the coal car which was at the forward end of the moving freight train. The front end of the automobile was crushed in on the right side and, altogether, considerably damaged. It was pushed or thrown from the center of the street over to, and slightly across the sidewalk, and when the collision was over it pointed in about the same direction in which the train was going. The plaintiff was thrown from the automobile and seriously injured.

At the close of the evidence, a motion was made that the jury be instructed to find the defendant not guilty. That motion was overruled. The jury brought in a verdict for $5,000.00, and upon that, judgment was entered.

It is contended by the defendant, (1) that the plaintiff was guilty of contributory negligence; (2) that as to negligence on the part of the defendant, the verdict is manifestly against the weight of the evidence; (3) that certain evidence was erroneously admitted; (4)

that the damages are excessive; and (5) that error was committed in giving a certain instruction.

(1) and (2). As to the contributory negligence of the plaintiff and the negligence of the defendant:- We are unable to find in the record sufficient evidence to justify the conclusion that the plaintiff was guilty of contributory negligence. There is no evidence which shows that the plaintiff, a passenger, in doing her duty under the circumstances, was bound in some affirmative way to caution the driver of the automobile. The locality was evidently not very well lighted, the train was coming backwards from a rather obscure region; the bell of the engine, even if ringing, was quite a distance away; the lights on the freight cars were certainly not very conspicuous as a warning; the whistling of the conductor was a rather primitive and feeble way of announcing a situation that might be one of grave danger, and there was neither watchman nor gates. We are of the opinion that there was ample evidence to justify the jury in concluding, under all the circumstances, that the defendant was guilty of negligence and that the plaintiff was in the exercise of ordinary care. Schnecwicex v. Ill. Cent. R. R. Co., 196 Ill. App. 248; Boggs v. Iowa Cent. Ry. Co., 187 Ill. App. 631. Diehl v. Ill. C. Ry. Co., 161 Ill. App. 48; Passwaters v. Lake E. & W. Ry. Co. 181 Ill. App. 44; McDonnell v. Lake Erie & W. Ry. Co., 208 Ill. App. 442; Hayman, Admr. v. Ill. C. R. Co., 206 Ill. App. 80; Follett, Admr. v. I. C. R. R. Co., 200 Ill. App. 2[illegible]; Christman v. Ill. Cent. R. R. Co., 199 Ill. App. 139.

(3) As to the admissibility of certain evidence: It is contended on behalf of the defendant that an improper hypothetical question was put to a doctor called by the plaintiff; that the question did not include all the necessary facts. The doctor was asked whether in his opinion certain facts were sufficient to justify him in stating whether "the present condition of dizziness and the pains in the back of the head and back, and the side * * * could have been caused * * * by the injury" etc. That was objected to "as not assuming all of the facts". It was put, and answered, yes. He was then asked whether he had an opinion as to whether those injuries were permanent. That was objected to, but allowed. He answered, yes. And, then, asked what that opinion was, he said, "Why, it has been in existence three years, and in my opinion it is permanent." The doctor did not testify that the injuries were actually the result, but that they "could have been caused" by, etc. The distinction may seem nice, but in reality it is substantial. It follows, therefore, that, although an hypothetical question does not contain all the facts the evidence may tend to prove, as long as the expert is only asked whether upon the assumption of those actually stated they might cause or bring about a certain condition, the question is unobjectionable. Heineke v. Chicago Rys. Co., 279 Ill. 210; Fellows-Kinbrough v. Chicago City Ry. Co., 272 Ill. 71.

It is further contended on behalf of counsel for the defendant that because one of the plaintiff's witnesses had testified on direct examination that he saw the automobile in question and observed the machine until it nearly reached the tracks, that he should have been allowed on cross-examination to ask about the speed

of the automobile. That contention is untenable. Whether or not the witness saw the automobile did not necessarily make competent any question on cross-examination as to its speed. Then, too, there was no special hardship, inasmuch as the defendant could have made the witness his own for that purpose.

It was also contended that the court erred in refusing to allow the counsel for the defendant to ask the plaintiff why she had brought her law suit in Chicago. Considering the issues involved, that question was properly ruled out on the ground that it was entirely immaterial and could in no way have any bearing upon the matter before the court.

Several other contentions were made concerning matters of evidence. Upon examination, we find them untenable.

(4) As to the damages being excessive: Immediately after being thrown from the automobile the plaintiff was taken in an ambulance to the St. Elizabeth's Hospital. She had received a wound in the scalp about two and one-half inches in length. The nasal bone was fractured. The right side of her face was discolored. There was a fracture of the zygomatic process of the temporal bone on the right side. The area just posterior to the ear (sic) was discolored. The forearms from the elbow down were discolored and bruised and likewise the legs from the knees down to the ankles. She complained of a pain in the back of her head on the right side and a pain in the lumbar region. For the first five days thereafter her speech was more or less irrational. She remained in the hospital about ten days.

The doctor who treated her testified that prior to the time of the accident her health was very good except occasionally when she suffered from severe colds and painful menstruation. Evidently after the accident she had no recollection of events until the succeeding 23rd day of July. The doctor who treated her, beginning October, 1916, testified that she had a very poor skin, pale lips, and complained of soreness in the back and across the pelvic organs; that he concluded she was troubled with secondary anaemia caused from poor health, loss of blood, injury or shock; that she gained quite rapidly under his treatment from October, 1916, to March, 1917. Her irregular menstruation he attributed to anaemia. She also consulted him about her knee and her back.

The plaintiff herself testified that she suffered pain in the back of her head and her hands and abdomen and in her left knee; that her gums shrunk away from her teeth; that the left front tooth was broken off; that her face was black and blue and her nose and right eye swollen; that she suffered intolerably the second week after the injury; that she was nervous and unable to sleep; that she was not able to walk without holding on to something; that during the first six weeks her head pained her and boils or pimples developed on it; that during the winter of 1915 and 1916 she had no appetite and was nervous and irritable and was not able to sleep well; that her back and the back of her head pained her more than anything else; that shortly after the accident she used to spit blood; that she is still

nervous and in warm weather is not able to sleep; that she now suffers most from the pains in the back of her head and in the right side of her back; that prior to the injury her health was very good and she weighed from 160 to 162 pounds; that after she returned from the hospital she weighed 132 pounds and in March, prior to the trial, 140 pounds.

Considering all the circumstances, the suffering, the actual physical injuries, the disfigurement, the loss of weight, and the evidence bearing upon the permanence of the general impairment of her health, we do not feel justified in concluding that the verdict was excessive.

(5) It is contended that the giving of the following instruction was error:

> "If you believe from a preponderance of the evidence that the plaintiff was a guest in the automobile at the time of the accident at the invitation of the owner without authority to direct or in any manner control the conduct of the driver of the automobile and that before and at the time of the accident she was in the exercise of ordinary care for her own safety, then the negligence of the driver of the automobile, if any, could not be imputed to her."

We are not able to say that the use of the word "authority" vitiates the instruction. Of course, she might speak and give information of impending danger, still the authority to direct and control the automobile remained with the driver. And, then further, the jury were definitely instructed in the fifth and seventh instructions given for the defendant as to just what the duty of the plaintiff was when riding as a passenger in the automobile; and that was, in part, "to assist such

driver by suggestion or protest, to avoid such apparent danger." We are of the opinion that the instruction was properly given.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

251 - 24602

GOTTLAUB L. LEVINSON,
Appellant,

vs.

CHARLES R. MORSE,
Appellee.

216 I.A. 037

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, having been struck and injured by defendant's automobile, while crossing Twelfth street, brought suit for damages. The cause was tried before a jury and a verdict and judgment entered in favor of the defendant. This appeal is therefrom.

Shortly after three o'clock on March 16, 1915, the plaintiff, 62 years of age, by profession a teacher, who lived near the corner of Twelfth and Robey streets started to walk north across the intersection of Twelfth and Robey streets. Twelfth street is an east and west street. Robey street crosses it but not at a right angle. The west line of Robey street, where it strikes the north line of Twelfth street, is about 91 feet farther east than the southwest corner of Robey and Twelfth streets. There are two lines of street car tracks on Robey street which extend northeasterly and southwesterly, that is, diagonally across Twelfth street. Twelfth street is 140 feet wide. That space, beginning at the south line, is made up as follows: Sidewalk, 14 feet; street containing street car track, 26

feet; parkway, 15 feet; boulevard, 40 feet; parkway, 15 feet; street containing street car track, 26 feet; sidewalk 14 feet. From the evidence it is a justifable inference, that the neighborhood was closely built up. The plaintiff had crossed over to the west end of the east parkway, and from there he started north, perhaps a little west of north, to cross the boulevard in Twelfth street, that part of it over which the Robey street car tracks run northeasterly and southwesterly. The defendant was traveling east on the south side of the boulevard-area of Twelfth street driving, what is called, a five passenger touring car with a coupe body on it.

The evidence of the defendant is to the effect that, as he approached the southwest corner,(having reference to the boulevard area) he was driving about 15 miles an hour; that he slowed up and blew his horn on account of two children who were going across to the north; that they waited until he went by; that at that time he was about 37 or 38 feet from the nearest street car track and at that time he saw the defendant going north; that the defendant was then about a quarter of the way across the boulevard and the automobile about 50 feet away; that the plaintiff was at that time five or six feet to the north and there was about 12 feet of space between the plaintiff and the south curve of the boulevard; that the plaintiff was walking at a moderate rate of speed with his head down; that as the automobile approached within about five feet of the plaintiff, the plaintiff "stopped and threw up his hands and backed into the

machine four or five steps"; that he then threw on the emergency brakes and the car stopped within 5 feet; that at that time the plaintiff was under the front end of the car, his head being to the east and his feet to the west; that he did not blow his horn.

The testimony of the witness Eva Gertz - who was walking south across the intersection - is to the effect that she passed the plaintiff just as he stepped into the boulevard; that she noticed a machine coming from the west and raised her hand, "because I saw it was running kind of fast so I raised my hand and screamed", "to the man that was in the machine because I was afraid for Mr. Levinson." She further testified that the defendant was "going fast" and that at the time she waived her hand the automobile was on the other side of the street west of the tracks.

It is the evidence of the witness Morris Price that there was a lumber wagon going southwesterly on Robey street, in the boulevard, at the time that the defendant was about to cross Robey street, and as they were coming together, the driver of the wagon was compelled to slacken his speed and turn his horses out slightly in order to let the automobile which he says "was going pretty fast" go by. His testimony suggests that the plaintiff became confused by reason of the wagon on one hand and the rapidly approaching automobile on the other and that in trying to get out of the way he was struck. On cross-examination he testified that the plaintiff "tried to get out either way andhe could not"; that

he kept going north until struck.

The witness Fullerman testified that the automobile was going from 20 to 25 miles an hour; that the plaintiff, before he started to walk on the boulevard looked east, west and north. Further, that there was a wagon going south in Robey street. When asked as to the automobile he answered, "It was right on the tracks at that time. I will tell you, he was going so sudden coming around the wagon that I could not really place where he was at that time." The evidence of Harry Goldberg is to the effect that the automobile was going "pretty fast". The evidence of another Harry Goldberg, a school boy, is to the effect that he was going north on his way home from school; that he did not remember any wagon; that as the automobile came up he let it go by and then started across himself; that he heard a shriek and looked around and saw the collision; that the automobile as it was going east turned from the north side of the boulevard towards the south.

The evidence of the plaintiff himself as to the circumstances at the time he was struck is entirely negligible; he testified somewhat concerning his injuries but was apparently unable to recall anything definite concerning the accident itself.

The evidence of the witness Mrs. Pappas is to the effect that she saw a lumber wagon, in the team track, east of the store, in which she worked and that it was going west; that the plaintiff was walking apparently straight ahead on the boulevard towards the store in which

she worked; that, as the automobile approached the plaintiff, she saw him "raise his hand and step backwards"; "He ran backwards. I saw him raise his hand and run back then I seen the automobile hit him"; that he ran straight back about 4 or 5 feet; that the automobile was going from ten to twelve miles an hour.

It is the contention of the plaintiff, (1) that the verdict is against the preponderance of the evidence; and (2) that the jury were erroneously instructed as to the law.

(1) It is the theory of the defendant that he was driving his automobile east on Twelfth street at about 15 miles an hour and that when he arrived at the intersection he slowed up to let some children who were going across to the north pass by; that they, however, did not cross immediately but waited until he went by; that, at that time, he saw the defendant about a quarter of the way across the boulevard, going north, the automobile being then about 50 feet west of him; that when in the immediate vicinity of the plaintiff and about to pass to the south side of him, the plaintiff, who was walking north, at a moderate rate of speed, with his head down, suddenly stopped and threw up his hands and backed four or five steps so that the automobile came in collision with him.

It is the theory of the plaintiff that - while in the exercise of due care and after looking east - he had just started north to cross the boulevard when the plaintiff, going at an unreasonable speed, negligently drove

into him.

The theory of the defendant is supported by his own testimony and that of the witness Mrs. Pappas, both of whom state that the plaintiff started backwards at just about the time that the automobile reached him.

It is difficult to reconcile all the evidence of the different witnesses. According to the witness Price, it would seem that the plaintiff got caught unexpectedly between the wagon, which he testified was crossing Robey street, and the automobile, and in the confusion, and endeavoring to get out of the way, was struck. The witness Fullerman, in part, corroborates Price in regard to the automobile. He said "it was right on the tracks at that time * * *he was going so sudden coming around the wagon that I could not really place where he was at that time." On the other hand Mrs. Pappas stated that she saw a lumber wagon in the team track but that it was east of her store. Harry Goldberg, the school boy, stated that he did not remember any wagon. Eva Gertz did not mention seeing the wagon. The testimony in regard to the speed of the automobile just prior to the time it struck the plaintiff varies. Mrs. Pappas puts it at ten to twelve miles an hour. The defendant, that he started across the tracks at ten miles an hour. Eva Gertz, that he was going fast. Price, that it "was going pretty fast." Fullerman, that it was going from twenty to twenty-five miles an hour.

Another circumstance to be considered is the testimony of Harry Goldberg, the school boy, that the

automobile as it came on east turned from the north side of the boulevard towards the south. Of course, if that is true, it may be that the defendant was undertaking to get by the lumber wagon without waiting to go straight east. It is impossible to reconcile the testimony in regard to the most important circumstances. If the plaintiff undertook to cross and started north and had gotten far enough north to leave room for the automobile to pass by him to the south, and the automobile was going at a reasonable speed at that time, and yet, without warning and unexpectedly, he started back south in the path of the automobile and the defendant did not have time, though exercising care, to prevent running into him, of course, there is no liability. If the jury considered the evidence in that light, and there was evidence tending to prove that to be the situation of fact, it follows, of course, that we would not be justified in overriding the verdict. It is true there is enough evidence in the record to give rise at least to a strong suspicion that the defendant was negligent but we do not feel reasonably justified, bearing in mind all the evidence, in concluding that the verdict of the jury was clearly against the weight of the evidence.

Where, in a personal injury case, after a fair trial, a verdict has been rendered for the defendant, it is but reasonable that a court of review, detached as it is from the pregnant atmosphere of the trial court, should treat that conclusion with considerable respect.

(2) As to the instructions. Ten instructions were given on behalf of the plaintiff and fourteen instruc-

tions on behalf of the defendant. The defendant took exception to all of the instructions offered by the plaintiff. Complaint is made of instruction G, given on behalf of the defendant, that it is argumentative. Upon examination of that instruction we do not find that it is objectionable, especially, when taken in conjunction with instruction ten, given on behalf of the plaintiff, they constitute a very fair statement of the law. The complaint that instructions F, I, and O, use the phrases "mere accident", "mere happening of the accident", does not constitute, in our judgment, such reiteration as to be error. Nor do we think it error that a certain number of instructions end, substantially, with the expression, "you should return a verdict of not guilty". An examination of all the instructions shows that they are properly based upon the evidence in the case and that they do not in any instance single out and make conspicuous any isolated disputed fact. Taking them, all in all, we are of the opinion that they quite accurately and exhaustively instructed the jury as to the law applicable to the evidence.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

347 - 24699

216 I.A. 637

MAX C. MUNZER, Appellant, vs. CHRIST BOYSCHON and JULIUS LOESER (as garnishee) Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 20, 1918, the plaintiff, Max C. Munzer, filed in the Municipal Court an affidavit for attachment setting up that the defendant, Christ Boyschon, was indebted to him in the sum of $125.00, "pursuant to his agreement and promise to pay the said affiant said agreed sum for brokerage at the agreed rate of one dollar ($1.00) per case for certain 125 cases of goods, wares and merchandise sold for him, said Christ Boyschon, by said affiant as a broker, on to-wit, the 15th day of July A.D. 1918, * * * to certain persons at agreed prices fixed by said defendant."

An attachment writ was duly issued against the defendant and also against one Julius Loeser, as garnishee, and on the same date returned "no property found" as to the defendant but with service upon the garnishee. On August 14, 1918, the appearance of the defendant was entered. On August 19, 1918, the cause was tried in the

Municipal Court without a jury. In the course of the trial it was admitted that at the time of service on the garnishee he owed the defendant the sum of $138.00. At the close of the plaintiff's evidence the trial judge, being of the opinion that there was a variance between the evidence and the facts set up in the affidavit of attachment, entered judgment for the defendant.

It is the theory of the plaintiff that there was no variance, and that if there were, he should have been allowed, upon his motion, which he made in the course of the trial, before judgment, to amend the statement of claim. The testimony as to the contract whereby the plaintiff claimed the defendant owed him $128.00 was very conflicting though there was ample evidence on the part of the plaintiff, if believed, to justify the conclusion that the defendant promised to pay the equivalent of $1.00 a case for certain merchandise which the plaintiff had undertaken either to purchase or sell for the defendant. The evidence shows that the defendant owned certain cases of wines and liquors and that the plaintiff undertook to make a cash sale for him of about 128 cases with the understanding that he was to get $1.00 a case for his services or as commission; and when objection was made in the course of the trial that the plaintiff's evidence tended to show that he did not act as a broker the plaintiff requested that he be allowed to amend the statement in his affidavit of attachment. That request the court refused.

From the view we take of it, however, there is

no material variance, for we are of the opinion that the plaintiff was entitled, under the statement in his affidavit for attachment, to put in the evidence which he offered. The statement in the affidavit of attachment recites that the defendant is indebted to the plaintiff "pursuant to his agreement and promise to pay the said affiant said agreed sum" etc. The mere fact that the statement then went on and undertook to explain what that was for does not render the evidence that was offered incompetent. It may be somewhat difficult from the evidence that was introduced and offered to determine exactly whether the money promised by the defendant to the plaintiff should be called brokerage or a commission or compensation for services rendered. We are of the opinion that the court erred in excluding the evidence which was offered to show all the material circumstances involved in the transaction.

Further, we are of the opinion that the plaintiff should have been allowed to make the amendment. An amendment to correspond with the exact nature of the oral contract between the plaintiff and defendant as shown by the evidence would not be the statement of a new series of facts, but merely a more apt expression of the terms of that contract, and its result; and, further, it would not in any way set up anything arising subsequent to the issuance of the writ. Section 28 of Chapter 11 (Hurd's Statutes 1916) is authority for just such an amendment. Ray v. Keith, 134 Ill. App. 122; Bailey v. Valley Natl. Bank, 127 Ill. 332; Hogue v. Corbit, 156 Ill. 540. The trial judge announced "you can amend the bond but you

cannot amend the affidavit for attachment." Under the circumstances that was erroneous.

Owing to the errors mentioned the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

75 - 24930

ARTHUR C. MEYERS,
Plaintiff in Error,

vs.

THE WARD BAKING COMPANY,
a corporation,
Defendant in Error.

216 I.A. 637

ERROR TO SUPERIOR COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for personal injuries alleged to have been caused by the negligence of the defendant. Upon trial the jury returned a verdict finding defendant not guilty and judgment was so entered, which plaintiff seeks to have reversed.

The accident happened on the evening of October 12, 1915, on 35th street in Chicago. A "Business Men's Association" was holding a street carnival on this street at this time, and a part of the carnival was a parade of motor trucks, some of which belonged to the defendant. Plaintiff was acting as marshall of the parade. One of such motor trucks crossed Indiana avenue going east on 35th street and after proceeding a short distance overtook the plaintiff, who was on horseback. Plaintiff was thrown from the horse, falling in front of the truck. One of his legs was caught in the running gear and broken. There was a conflict in the evidence as to whether or not the truck collided with the horse or whether the horse stumbled without being touched by the truck and, partly falling, threw plaintiff onto the car track.

The jury could properly believe that defendant's truck crossed Indiana avenue and proceeded eastward on 35th

street, pursuant to signals from the plaintiff, the marshall of the parade; that the truck overtook plaintiff on his horse some 20 feet east of Indiana avenue; that at this time the horse was south of the eastbound car track which runs on 35th street, and that the front wheels of defendant's truck were wholly within the eastbound car track. There was credible evidence tending to prove that the accident was caused by the stumbling of the horse, throwing plaintiff to the ground.

The negligence alleged was the careless operation of the truck; upon the evidence the jury properly found that this was not proven. The speed of the truck was estimated variously at from two to eight miles an hour, and after plaintiff fell the truck was stopped within a short distance. The driver was proceeding carefully, looking ahead, and while plaintiff's horse may have collided with the truck, this was not caused by the negligence of the driver. It was purely an accident which might easily have happened under the circumstances without anyone being at fault.

Complaint is made of the cross-examination of plaintiff and the conduct of the trial court in permitting questions to be repeated. It is quite evident that the insistence of defendant's counsel in his questions was caused by the apparent disinclination of the witness to answer directly and definitely. Under the circumstances there was no error either on the part of court or counsel.

It was not error to give at defendant's request instruction number 8, to the effect that plaintiff was required to establish defendant's negligence as alleged in the declaration by the preponderance of the evidence; such an instruction was approved in Chicago Union Trac. Co. v. Mee, 218 Ill. 9.

The objections made to defendant's instructions 15 and 16 are not of sufficient importance to require a reversal.

As we cannot say that the verdict of the jury is not in accord with the weight of the evidence and as there were no errors upon the trial, the judgment is affirmed.

AFFIRMED.

64 - 25307

CHARLES L. DOUGHERTY, doing business as CHARLES L. DOUGHERTY & CO.,
Appellant,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a corporation,
Appellee.

216 I.A. 638

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages alleged to have been suffered because of the failure of the defendant to furnish water to run an elevator at Matteson, Illinois, which plaintiff occupied under a lease from the defendant. The damages claimed consist of demurrage, interest on invested capital, wages and rent during the period the elevator was closed. Plaintiff claimed damages to the extent of $1000 and upon trial by the court was awarded $238.75. Plaintiff has appealed from the judgment for this amount, claiming to be entitled to a larger sum. Defendant, by cross errors, claims that plaintiff was not entitled to any recovery from the defendant. In 1897 the defendant was the owner of a grain elevator on its side tracks at Matteson, Illinois, and leased same to the plaintiff, who continued to occupy it as lessee until and after this suit. This period of time was covered by various written leases in which the premises were described by metes and bounds, together with "appurtenances" thereto belonging.

The elevator was operated by steam power, without which it was of no value to the lessee. For some time after 1897 the water with which to furnish the steam was supplied by

defendant through pipes connecting with its water power and pumping station located a short distance from the elevator. For some years this was furnished without extra compensation, but in January, 1903, the defendant wrote to plaintiff a letter, which was duly received, in which, after referring to the lease for the use of the elevator and the extension leases, defendant stated that it found that through error no bill had been rendered for the cost of water theretofore furnished, and concluded:

> "Please take notice that effective Feb. 1st, this company will render bill against you at the rate of six cents per thousand gallons for all water which is supplied from our reservoir above mentioned."

Pursuant to this letter the plaintiff thereafter paid the defendant for water furnished at the rate therein mentioned, and defendant continued to furnish water, although no mention of it or the charge therefor was made in any of the various leases in effect thereafter or at any time. On December 31, 1912, the gasoline engine used by the defendant in pumping water into the elevator failed to work. There seems to have been a defective or broken cylinder. Whatever was the trouble, it does not appear that there was any neglect or unreasonable delay on the part of the defendant in attempting to make the necessary repairs. However, it was not until January 8, 1913, about eight or nine days after the breaking down of the engine, that the pumping was resumed. During this period, and as a consequence of the lack of water, the elevator was closed, subjecting plaintiff to the losses claimed. It is also in evidence that there were other sources in Batteson which could have supplied plaintiff with water. The Illinois Central Railroad Co. had a supply at the same distance from the elevator as the defendant's supply, although it does not appear that the Illinois Central's supply was connected with the elevator with pipes.

Plaintiff claims that the right to water to be furnished by defendant passed as appurtenant to the premises demised by the written lease, which is dated July 28, 1911, for a term of five years from August 1, 1911, - the existent lease at the time of the present occurrence. The trial court based its judgment upon the correctness of this claim. In so doing we hold that the court was in error, for the reason that there was no obligation upon the defendant to furnish water to the elevator leased by the plaintiff.

Plaintiff's claim is based upon the contention that the water was an appurtenance to the leased premises and was so contemplated by the parties at the time of the leasing. There is no mention of water in any of the leases, and for over eight years after February 1, 1903, all water furnished was paid for at the rate of six cents per thousand gallons, pursuant to the letter of that date. The bills were made out upon the basis of the water used and payments therefor were continued without reference to any new leases which were executed at the expiration of prior leases. We cannot see anything in the conduct of the parties to indicate that the parties intended that the water supply should be an appurtenance to the premises; rather it was treated as an extra, just as gas and electric power or light, and was paid for wholly upon the basis of a commodity unconnected contractually with the lease. This view is emphasized by the fact that plaintiff could have obtained the necessary water to run this elevator from other sources than the defendant.

Thomas v. Wiggers, 41 Ill. 470, is distinguishable from the instant case. That opinion says the gravamen of the action was not in cutting off the supply of steam, but in cutting the pipe which supplied the steam. Some of the other cases cited have this same distinguishable feature, namely, some physical change in the premises held to be included in the lease. In the

cases touching a supply of a commodity there is evidence as to an agreement of the parties that such commodity should be included in the lease.

In the case before us there was no change in the physical conditions and clearly no agreement that any water supply should be included in the lease. The understanding of the parties as to this supply rests solely upon the letter of January, 1903.

Inspection of the letter relating to the water supply shows that there was neither obligation of one party to furnish nor of the other to take. It only proposes to fix a price for the amount of water furnished and taken.

An executory contract under seal cannot be modified under parole evidence nor any new terms added thereto. (Becker v. Becker, 250 Ill. 117.)

A contract lacking in mutuality cannot be enforced. (Winter v. Trainor, 151 Ill. 191; Clarke v. Potts, 255 Ill. 183; Ulrey v. Keith, 237 Ill. 284.)

Holding as we do that there was no enforceable contract between the parties touching the water supply, it follows that there is no liability upon the defendant for its failure in that respect, and plaintiff is not entitled to recover his damages occasioned thereby. For the reason above indicated the judgment is reversed, and as there can be no recovery, judgment of nil capiat will be entered in this court; costs to be taxed against appellant.

REVERSED; JUDGMENT OF NIL CAPIAT.

89 - 25340

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

SAMUEL SCHAEFER,
Plaintiff in Error.

216 I.A. 638

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant upon trial by the court was found guilty and fined $10 and costs. The nature of the information and charge against him is not disclosed by the abstract filed in this court.

The bill of exceptions or stenographic report has heretofore, upon motion, been stricken from the statutory record. None of the assignments of error relates to any part of the record which is properly before us; therefore we are unable to determine as to the justice of the finding and judgment of the trial court. Under such circumstances it will be presumed that the judgment is correct and hence it will be affirmed.

AFFIRMED.

102 - 25354

W. G. TENNANT,
Defendant in Error,

vs.

JOHN HEMWALL, Impleaded with
LOUIS ABSHER,
Plaintiff in Error.

216 I.A. 638

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Hemwall, seeks the reversal of an adverse judgment in an action of replevin of an automobile. The automobile was found in the possession of the defendant, Absher, and taken by the bailiff and delivered to the plaintiff. Absher is not here to question the judgment.

The plaintiff testified that he had loaned to W. C. Lurton $500, evidencedby two notes, secured by a chattel mortgage conveying the automobile in question, and that neither of the notes nor any part of the same had been paid. The notes and the chattel mortgage were introduced in evidence. By the terms of the mortgage, upon default in payment of the notes, the mortgagee, the plaintiff Tennant, was entitled to immediate possession of the automobile. This made out a prima facie case for the plaintiff.

The only opposition comes from the defendant, Hemwall, who did not have the automobile in possession and whose interest in the matter does not appear. He sought to oppose plaintiff's claim by the attempted introduction of certain letters written by Lurton which, it is said, indicate that Lurton was not the owner of the car at the time he made the chattel mortgage. The letters were properly ruled out as in-

competent. They could not affect the rights of plaintiff as against the defendant, and even if competent would not prevail against the mortgage. In Cummins v. Holmes, 109 Ill. 15, it was held under similar circumstances that the mortgagee had the right of possession as against the mortgagor and creditors, whether the mortgage was valid or not, until this right was challenged in some mode known to the law.

It was not error to refuse the propositions of law tendered by the defendants. They were not applicable to the facts of the case.

The judgment was proper upon the evidence and is affirmed.

AFFIRMED.

18 - 24388

LUCILE FRANCES DUSTIN,
Plaintiff in Error,

vs.

CENTRAL BUSINESS MEN'S ASSOCIATION,
a corporation,
Defendant in Error.

216 I.A. 638

ERROR TO SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On or about September 1, 1914, the defendant being then engaged in doing a life insurance business, sent out by mail a number of printed circular letters to prospective purchasers of insurance. One of these letters was sent to Dr. John F. Dustin of Deadwood, S. D. A material part of this letter is as follows:

> "I want you to see our policies and examine them at our risk. Fill out the application and the policies will be sent you subject to your approval. You need send no money. If the policy is not satisfactory to you in every respect you can return it to us without obligation on your part. If you want to keep the policy the first payment will carry you to Jan. 2, 1915."

This circular letter called attention to the dangers of septic infection incurred by physicians, and it recited among other things as follows:

> "Now is the time to join the Association since we are giving a special inducement this month. Five dollars for the accident or ten dollars for the combination policy will carry you through the autumn months and half of the winter to Jan. 2, 1915."

Some time before September 21, 1914, the defendant received the application dated September 16, 1914, from Dr. Dustin for an accident insurance policy for the sum of $5000 to be paid in case of the death of insured by accident, and on September 21, a policy was issued by defendant and mailed to Dr. Dustin, together with a statement on the printed letterhead of defendant, which was as follows:

"Dr. John Francis Dustin, 659 Main street, Deadwood, S. D. Dr. to Accident Policy No. 9608, first quarterly premium $5, Health policy No. 10197, first quarterly premium $5, total $10; $10 pays your insurance to January 2, 1915, per our special offer."

The first paragraph of the application signed by Dr. Dustin is as follows:

"I hereby make application for membership in the Central Business Men's Association, to be based upon the following statement of facts, which I warrant to be true and complete, and agree that the application shall not be binding upon the Association until accepted by the Association and policy issued thereon."

Four or five days after September 21, 1914, the defendant mailed to Dr. Dustin the following letter:

"A few days ago we received your application for membership in this Association. Your application was accepted and the policy was forwarded to you subject to your approval as per our special offer made you.

The only obligation assumed by you is that you give the policy careful consideration, and if not satisfactory return the same to us.

If you have examined the policy I am sure it has pleased you because it covers every disability and has no exceptions or restrictions.

It is to your advantage to accept the insurance and make remittance at once as per the enclosed statement, since the sooner your remittance is received the more insurance you get for the first payment."

On October 1, 1914, a third letter was mailed by defendant to Dr. Dustin, a part of which is as follows:

"Some time ago we sent you our policy subject to your approval with the understanding that if satisfactory you would remit the first premium, and that if not satisfactory the policy would be returned.

Since you have not returned the policy we feel that it must have been satisfactory, and no doubt you have just neglected the remittance. The insurance becomes effective just as soon as your remittance is mailed, and you cannot afford to be without protection for a single day.

We feel that we are entitled to a decision in this matter at once since this is the second letter to you, and trust we may receive your remittance as per enclosed statement."

This letter informed the Doctor that his insurance became effective "just as soon as your remittance is mailed," etc.

It is admitted that Dr. Dustin met his death in an automobile accident on September 27, 1914. It cannot be determined

from the record whether defendant's second letter was ever received by deceased, although it was shown that it was not returned to defendant. The third letter referred to above was mailed three or four days after Dr. Dustin's death, but the evidence tends to prove that defendant had no notice of the death at the time the letter was mailed. The policy which was mailed by defendant to Dr. Dustin was found in an envelope in his desk after his death. No premiums were ever paid by Dr. Dustin or by anybody for him on the policy. At the close of all the evidence the trial Judge on motion of the defendant instructed the jury to return a verdict for defendant. The jury did as directed. Judgment was entered on the verdict and the plaintiff brings the case here by appeal.

The defendant insists that no contract of insurance had ever been entered into between it and deceased; that it had never completed a contract of insurance with deceased, and that the policy found in deceased's desk was mailed to him for examination and was not to be regarded as expressive of a completed contract until deceased had indicated his acceptance of the policy and had paid to defendant a first premium thereon. The defendant refused to pay the loss for the reason that it was not liable at all upon the policy. This constituted a waiver of its right to demand proof of loss. Home Insurance Company v. Meyer, 93 Ill. 271.

The controlling facts in the case are not in dispute. The main question in controversy is whether a binding contract had been entered into between defendant and deceased before September 27, 1914. We are inclined to agree with many of the legal propositions contended for by counsel for plaintiff in support of its assertion that a completed contract had been entered into between defendant and Dr. Dustin at the time of the mailing of the policy, and for the purposes of this case it may be assumed that

the acceptance of an application for insurance and the unconditional issuance of a policy completes the contract. Devine v. Federal Life Insurance Co., 250 Ill. 203; that where an application for insurance has been accepted and a policy issued thereon and placed in the mails for the sole purpose of ultimately reaching the applicant, a contract of insurance will be regarded as completed. New York Life Ins. Co. v. Babcock, 104 Ga. 67. That where there is nothing in the contract to the contrary, the risk on an insurance policy begins with the date of the policy; Rose v. Mutual Life Ins. Co., 240 Ill. 45; and, finally, where the status of the parties becomes fixed by a completed contract of insurance the contract cannot be repudiated, altered or modified by subsequent letters of one of the parties thereto. Joyce on Insurance, 2nd ed., vol. 1, sec. 62.

It is insisted, however, on behalf of the defendant, that the contract of insurance by the agreement and understanding of the parties thereto, was not completed at the time the policy was mailed to the insured. In the Babcock case supra it is said:

> "Where one party makes a proposition to purchase a thing which is unconditionally accepted by the other, the contract of purchase becomes complete. There is no reason why the same rule should not be applied when a written application is made for an insurance policy."

Accepting, then, the statement above quoted as a fairly adequate expression of the law applicable to the facts of the instant case, we are to inquire whether the proposition to issue a policy to deceased had been unconditionally accepted by him.

The evidence does not show that the premium due on the policy was paid prior to the death of deceased, nor that he had at any time examined the policy or had indicated any intention to accept it. In other words, it appears clearly from the

record that at and prior to the time of his death Dr. Dustin had performed no act which would have rendered him liable for the payment of any premium due on the policy, nor is it shown by the evidence that the defendant on its part had indicated any intention or purpose to waive its undisputed legal right to claim payment of the premium before the policy was to go into effect. Indeed such evidence as there is in the record on the subject points in the opposite direction.

In the circular letter mailed to Dr. Dustin about September 1, 1914, the defendant informed him that "if the policy is not satisfactory to you in every respect you can return it to us without obligation on your part. If you want to keep the policy the first payment will carry you to January 2, 1915." The language of this offer to sell insurance is not ambiguous, and its plain meaning is that the defendant stood ready to be bound by its offer to insure deceased so soon as he had examined the policy mailed to him and had indicated his satisfaction therewith and had paid the first premium which would have given vitality to the policy until January 2, 1915. None of these conditions was performed by deceased prior to his death.

It is true, as urged, that the application for insurance which was executed by Dr. Dustin contained the stipulation that defendant was not to be bound until the application was accepted by defendant and a policy was issued thereon; but this language, in searching for the intent of the parties, should be construed together with their prior or contemporaneous correspondence. The application did not constitute the complete contract for insurance. A letter which was mailed by defendant to insured at the same time as the policy contained

the statement, "Your application was accepted and the policy was forwarded to you subject to your approval as per our special offer made to you." The special offer was that contained in the circular sent to the defendant, and this was, as we have stated, to the effect that the defendant stood ready to complete the contract so soon as the insured had indicated in some manner that he was satisfied with the policy mailed to him and had paid the premium due thereon. We can find nothing in the correspondence of the parties nor in the language in the application nor in the policy which indicated any willingness on the part of the defendant to waive its right to the payment of the premium due on the policy.

The declaration filed by plaintiff did not charge that the insured had ever paid any premium on the policy and the evidence did not disclose that he had accepted it. A verified plea of the general issue was filed by the defendant.

In Continental Life Insurance Co. v. Rogers, 119 Ill. 474, the Supreme court said:

> "So in this case, the plaintiff was bound to aver and show in her declaration, the making of the policy, its terms, the payment of the premium, the death of the assured, and the giving of notice, and making proof thereof, to the company. When these averments had all been proved, in so far as their proof had not been waived or dispensed with, a prima facie right of recovery was made out against the defendant, which the latter was bound to meet by some affirmative action; otherwise the plaintiff was entitled to judgment."

In the case of Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115, it was held that -

> "The interposition of the verified plea of the general issue cast upon appellee the burden of proving the execution, delivery, and acceptance of the policy and that the same was in force at the time of the fire."

There is, we think, much merit in the contention that neither the allegations of the declaration nor the proof submitted showed a prima facie right of recovery in the plaintiff. The policy which was mailed by defendant contained no acknowledgment

of receipt of payment of the premium. The defendant was not therefore estopped on grounds of public policy or otherwise to deny that the premium had been paid. The policy contains the recital that "in consideration of the premium and of the warranties made in the application," etc. This language, as we read it, does not amount to an acknowledgment of the receipt of payment of the premium. There are cases in the books to the effect that the acceptance of an application for insurance is binding upon the insurer and a completed contract may result therefrom; but these are cases where the evidence showed that such was the purpose and intention of the parties to the contracts. But where it appears, as it does here, that the policy was not mailed for the sole purpose of reaching the applicant, but was accompanied by conditions which required some overt conduct on the part of the applicant, the contract cannot be held to be complete until performance by the applicant of the conditions imposed. Where a policy of insurance shows upon its face that premiums due thereon have been paid, an actual failure to make such payment cannot be set up as a defense to an action on the policy. Illinois Central Ins. Co. v. Wolf, 37 Ill. 355; Provident Life Ins. Co. of Chicago v. Fennell, 49 Ill. 180; The Teutonia Life Insurance Co. v. Anderson, 77 Ill. 384. And where the express terms of a proposed contract for insurance shows that it is not to be enforceable until examined and formally accepted by an applicant for insurance such contract will not be completed until its acceptance by such applicant.

In Cooley's Insurance Briefs, vol. 1, p. 429, it is said that -

> "It is evident that if any act remains to be done which may be regarded as giving the applicant an opportunity to approve the contract finally offered to him, acceptance of the proposal by the insurer does not complete the contract."

It was held in Richardson v. N. W. Mutual Life Ins. Co., 143 Ill. App. 279, that -

"While it is true as contended by appellee that possession of a policy of insurance by the applicant raises a presumption that the policy has been delivered and accepted, yet such presumption may be rebutted by showing that such applicant was permitted to take the policy merely for the purpose of examining it and determining after such examination whether or not he would accept it. Equitable Life Assurance Co. v. Mueller, 99 Ill. App. 462; N. Y. Life Ins. Co. v. Easton, 69 Ill. App. 479."

In the case of New York Life Insurance Co. v. Easton, 69 Ill. App. 479, notes had been executed and delivered by Easton to an insurer who transferred them to an innocent holder. Easton was compelled to pay the notes and he brought an action against the insurance company to recover the amount so paid. The notes were given in payment of premiums on policies which had been mailed to Easton by the insurer. The evidence showed, however, that the policies were sent to Easton subject to his approval upon examination. He examined the policies and notified the insurance company that they were not satisfactory. In deciding the case the Appellate court said:

"At least one infirmity in this position, and a fatal infirmity too, is that unless the appellee accepted the policy no part of it was binding upon him.
The receipt of the policies through the mails was but a tender of them to appellee for acceptance.
It cast upon him the duty of accepting them or of objecting and making his objection known to the company."

The above authorities and others to which our attention has been directed by counsel for defendant are in direct support of the contention that no completed contract was at any time entered into between Dr. Dustin and defendant. The minds of the parties had never met at any time upon one and the same thing. While the language of the circular letter with respect to the first premium payment did not in explicit terms require that payment of the premium was to be made at the time of the acceptance of the policy, no other meaning can

reasonably be derived from the letter. The language is, "If you want to keep the policy the first payment will carry you to January 2, 1915." This was a sufficient notice to the applicant that if he intended to procure the protection furnished by the policy he was required to either accept or reject it, and in case of the former to pay the premium due thereon.

A letter mailed to deceased's address three or four days after his death could not, of course, have the effect of modifying or abrogating the contract; it was admissible in evidence, we think, under the circumstances, as an aid in determining the intent of the parties. Defendant had no knowledge of the death of insured at the time it was mailed, and hence it was not self-serving in character. It was one of a series of letters, which taken together plainly show that the contract was not to be in force by the mere receipt and acceptance of the application by the defendant. The material evidence in the record is uncontradicted and this evidence does not indicate, as urged, that the insurer intended to become bound on the date of the issuance of the policy, nor did the fact that Dr. Dustin did not return the policy indicate a purpose on his part to retain it. Whether he so intended cannot be determined from the record.

The trial Judge did not err in instructing the jury to find the issues for the defendant as the uncontradicted and unexplained evidence admitted on behalf of defendant showed that no contract of insurance had been entered into between defendant and deceased. Helm v. Illinois Commercial Men's Association, 279 Ill. 570.

The judgment of the Superior court is affirmed.

AFFIRMED.

2 - 24874

ABRAHAM MARCUS,
Plaintiff in Error,

vs.

YELLOW CAB COMPANY,
a corporation,
Defendant in Error.

216 I.A. 339

ERROR TO SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment entered in the Superior court of Cook County in his favor and against defendant for the sum of $200.

It was charged in plaintiff's declaration and shown by the evidence introduced on the trial that the plaintiff sustained injuries while riding as a passenger in a taxi cab operated by defendant. The evidence shows that the accident occurred on September 29, 1916, on 31st street near its intersection with State street in Chicago; that the cab in which plaintiff was riding was struck by an automobile running in a southerly direction on State street. The plaintiff sustained injuries as a result of the collision between the cars. The jury which tried the case rendered a verdict in his favor for the sum of $200. It is insisted, first, that this verdict is grossly inadequate.

The evidence introduced by the plaintiff tended to show that the plaintiff was about 23 years old at the time of the accident. Prior to this time, in March and April, 1916, and again in July, 1916, he had suffered from malaria and was treated for this illness by Dr. Goldberger. In the year 1904 he sustained a fracture of a bone of his left ankle; this bone was again fractured in 1906. In 1910 he sustained a gunshot wound in the abdomen

which necessitated a surgical operation and which confined him to a hospital for eight weeks.

It is conceded that the plaintiff sustained certain cuts, wounds and bruises about the head and body, which were not of a very serious character. It is asserted, however, by the plaintiff that he sustained a hernia as a result of the accident and also that he had become, as a consequence of the injuries he received, afflicted with epilepsy. With reference to the alleged hernia the evidence was in direct conflict. The evidence shows that this injury was what is known as an "inguinal oblique hernia," and the testimony of expert witnesses offered by either side is, as would be expected, in direct contradiction as to the cause of this alleged condition. Witnesses for the defendant testified at length touching their reasons for their given opinions that such hernia could not be produced by a single act of violence.

We are wholly unable from the record before us to say that the evident conclusion of the jury that the alleged hernia and the alleged epilepsy were not caused by the accident was erroneous. The testimony of certain of defendant's witnesses is to the effect that the plaintiff was a sufferer from what is known as "nocturnal epilepsy;" that this form of epilepsy constitutes a branch of general epilepsy which is never caused by trauma. There is some evidence in the record tending to support the claim that the epilepsy might have been the result of malarial attacks suffered by plaintiff before the accident occurred. But whatever the cause of this illness, under the evidence the question was properly submitted to the jury, and we cannot interfere with its conclusion where it appears, as it does here, that the verdict finds substantial support in the evidence; and so, also, with reference to an alleged injury as the result of the accident to plaintiff's ankle.

The evidence shows that this ankle had been twice broken before the date of the accident, and whether an asserted limitation of the use of this ankle at the time of the trial was caused by the prior injuries or the accident in question were matters for the determination of the jury.

No reversible error was committed by the trial Judge in his rulings on the admission of evidence. A certain given instruction is complained of which we think is erroneous and should not have been given to the jury. This instruction dealt with contributory negligence, but as the verdict of the jury was in favor of the plaintiff, the giving of the instruction does not appear to have been prejudicial to him.

In the case of Arrowsmith v. Barker, 135 Ill. App. 142, an instruction in substance similar to the one under consideration here was complained of, and the court held with reference to an asserted inadequacy of damages awarded to plaintiff that the instruction did not in any degree influence the jury in determining the amount of damages assessed against the defendant.

While the verdict of the jury is small in view of the character of the injuries which it is admitted plaintiff received, we do not think that it is so inadequate as to warrant the belief that the jurors were moved by passion or prejudice. Schulk v. Joliet & Southern Traction Company, 154 Ill. App. 108.

The judgment of the Superior court of Cook County will be affirmed.

AFFIRMED.

11 - 24964

TUSTIN PACKING COMPANY,
a corporation,
Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant in Error.

ERROR TO COUNTY COURT OF COOK COUNTY.

216 I.A. 639

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County court of Cook County in favor of the defendant.

The plaintiff charged in its declaration, consisting of three counts, that defendant failed to safely and securely carry and deliver 396 boxes of lemons from Tustin, California, to Syracuse, New York; that defendant had failed to carry the shipment within a reasonable time and that it had been guilty of negligence as warehouseman in the care of the shipment after its arrival at Syracuse. Evidence introduced on the trial tends to prove that the lemons were in good condition when shipped and that they were properly loaded upon a standard refrigerator car of the Pacific Fruit Express Co. The shipment left Tustin April 2, 1915, and arrived in Syracuse April 13, 1915.

It is a contested question of fact whether the goods reached Syracuse within a reasonable time after their shipment at Tustin. The proof admitted on behalf of the defendant is amply sufficient to support a conclusion that no unreasonable or unusual delay occurred in delivering the lemons at Syracuse. The standard refrigerator car in which the lemons were shipped contained certain appliances which were used for the purpose of protecting perishable goods from a too high or too low temperature.

The chief claim of plaintiff is that the goods were damaged because of freezing while in transit and after they arrived at Syracuse. Under the evidence this condition could not have occurred at any time prior to the arrival of the lemons in Syracuse, except possibly on April 12th, when the temperature was for a part of the day as low as 30 degrees above zero. April 14, 1915, the day after the goods arrived in Syracuse, the temperature fell to 28 degrees above zero. There is evidence that for three or four days thereafter the goods were in the course of unloading by plaintiff's representatives, and whether they became damaged at this time was a question of fact for the jury.

A witness for plaintiff testified that he inspected the carload of lemons at Syracuse, and that -

> "The car was chilled in the top tier and in the middle but could not then tell how badly it was frozen. The lemons began to sweat after the car was loaded and we found the lemons in the end of the car when unloaded were frozen."

Insofar as it is sought to charge defendant as warehouseman, the law imposed upon plaintiff the burden of proving that defendant had been guilty of some negligence as such which proximately contributed to cause the damages plaintiff complains of, and on the evidence we think that whether the plaintiff had sufficient proof in this particular and whether on the whole evidence the defendant can be said to have been guilty of such negligence, were questions for the jury. Gregg v. Illinois Central R. R. Co., 147 Ill. 550. It is extremely doubtful, to say the least, that the lemons could have been frozen prior to their arrival at Syracuse, but whether their frozen condition occurred before the lemons arrived at Syracuse or whether they became frozen thereafter while they were in possession of defendant as warehouseman, were questions which were properly submitted by the trial Judge to the jury.

The court refused to give the jury an instruction

tendered by plaintiff which attempted to define an act of God as applicable to the facts of the case. We think the instruction was properly refused. No defense was made that the goods became frozen through an act of God. The defenses were that no unreasonable delay occurred in the shipment of the goods; that they had not been exposed to a freezing temperature prior to their arrival at Syracuse, and that if the goods in question became frozen after their arrival at this point, then this condition was not caused by any negligent act of the defendant. The instruction then had no place in the case.

Complaint is made of the giving of an instruction tendered by the defendant, and it is said in connection therewith that the law imposed the duty upon defendant not to counter balance, but to overcome, the prima facie case made by defendant. In another given instruction the jury were told that the burden rested upon the defendant to rebut the presumption which arose from evidence of the good condition of the fruit at the time of its shipment and of its damaged condition at the place of destination. When the given instructions are read together we do not think the jury could have been misled. The instruction complained of is in some particulars too favorable to the defendant, but in view of the strength of defendant's evidence, so far as it related to the duty imposed upon it as a common carrier, we are not prepared to say that the giving of the instruction constituted reversible error.

No reversible error was committed by the trial court in its rulings on the admission of evidence. A witness who had never seen the car in question testified generally as to the construction of standard refrigerator cars similar to the one in which the lemons were shipped. This witness had competent knowledge and experience with respect to the subject concerning which

he testified, and he did not attempt to describe more than the construction and purpose of this class of car.

Counsel for defendant made certain remarks during the course of his argument to the jury which were objectionable. An objection to these remarks was sustained and they were promptly withdrawn. They were not so inherently offensive in character as to warrant a reversal of the judgment.

The judgment of the County court of Cook County is affirmed.

AFFIRMED.

13 - 24983

WEST AMERICAN FRUIT COMPANY,
a corporation,
Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant in Error.

ERROR TO COUNTY COURT OF
COOK COUNTY.

216 I.A. 639

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks by writ of error to reverse a judgment entered in the County court of Cook county in favor of the defendant.

Plaintiff brought its action to recover damages arising from alleged injuries to and deterioration of two shipments of oranges which were shipped from Redlands, California, to Spokane, Washington, and Detroit, Michigan, respectively, in January, 1915. The shipments were what were described at the trial as "tramp shipments", which term, according to the evidence, signifies that the particular shipments were to be delivered at different places from time to time for the purpose of offering the oranges for sale.

The declaration filed in the cause alleged that on January 19, 1915, the parties entered into a contract at Redlands, California, under which the defendant agreed to safely convey 396 boxes of oranges within a reasonable time from Redlands, California, to Spokane, Washington, and also on January 28, 1915, defendant agreed to safely carry 396 boxes of oranges within a reasonable time from Redlands to Peoria, Illinois; that the latter shipment was diverted to Detroit, Michigan.

Plaintiff seeks to recover damages for injury to the oranges caused by alleged negligence on the part of defendant in failing to safely and securely carry them, and by its negligence as warehouseman at Spokane, Washington, and Detroit, Michigan, in failing to properly care for the oranges after they arrived at their ultimate destination. The verdict of the jury which tried the case was in favor of the defendant and judgment was entered upon this verdict.

The evidence shows that by reconsignment orders given at different points the Spokane shipment, which was originally destined to Tracy, California, was diverted to Portland, Oregon; Seattle, Washington, and,finally,to Spokane, Washington. The Detroit car was destined to El Paso, Texas, and was diverted to San Antonio, Texas; Fort Worth, Texas; Kansas City, Missouri; Peoria, Illinois, and, finally, to Detroit, Michigan. The evidence shows that these reconsignment orders necesssarily caused much delay in delivering the oranges at Spokane and Detroit. The bills of lading delivered by defendant expressly exempted it from liability in respect to any loss, damage or delay sustained by the shipments while they were held in transit upon request of the shipper.

There is no doubt in the evidence that the oranges when finally accepted and delivered at Spokane and Detroit were in a deteriorated condition; depreciation of 21 per cent having taken place in the Spokane shipment and 50 per cent in the Detroit shipment. In addition to this certain of the boxes which contained the oranges shipped to Spokane were broken. The Spokane car was held at Spokane for at least seven days. There is evidence which tended to show that the consignee named in the diversion order to Spokane could not be found by the carrier and that it was unable during the seven days to deliver the goods to anybody authorized to re-

ceive them and, also, that the Detroit car was held for about five days at Detroit, during which time the shipper's representatives failed to remove the oranges from the car.

The defendant contends that the evidence fairly shows that the deteriorated condition of the goods was the result of the delay caused by the diversion orders which necessarily compelled the carriers to hold the goods for several days during their transit from Redlands to Spokane and Detroit respectively, and during the time that the oranges were kept at the latter named points through no fault of the defendant. Plaintiff's evidence is to the effect that the oranges were shipped in a good, sound condition at Redlands, and were in a damaged condition when delivered to its representatives at Spokane and Detroit. Evidence was introduced which tended to show that the oranges were shipped in cars equipped with certain ventilating appliances which were required to be kept open when the temperature outside the cars was above 32 degrees above zero and closed when the temperature was below this point.

Evidence was introduced by defendant which tended to prove a complete record of the shipments from the time they left Redlands, California, until they reached the points of final destination and which tended to show that the goods during transit were not subjected to temperatures which could have caused the deterioration of the oranges. The evidence does disclose that the vents on the box cars which contained the shipments were open during the time the cars remained unloaded at Spokane and Detroit, and, also, at two or three points on the route, when the outside temperature was below 32 degrees above zero, and, further, that the vents were closed at certain times when the temperature was above this point, but whether these facts did or could cause freezing and decay of the oranges were disputed questions which were properly left to the jury.

The evidence also tended to show that the goods were transported by defendant from place to place on the routes in the usual and customary time, and that such delays as occurred during transit were the result of the reconsignment orders which were made on the request of the shipper.

It is insisted for the plaintiff that the verdict of the jury was contrary to the law and the evidence in the case. The plaintiff did introduce testimony which if believed by the jury would warrant a finding that the goods were in sound condition when shipped and if this were the only question of fact in the case we would be inclined to hold with the plaintiff. The record shows, however, a conflict of evidence concerning the history of the shipments after they left Redlands, and as to what caused the admitted deteriorated condition of the oranges. Certain evidence introduced for the defendant would, if believed, warrant the conclusion that the condition and appearance of the oranges at the points of final destination indicated that their decayed condition was not caused by freezing as asserted by plaintiff, but was directly attributable to over-ripeness which resulted from the delays during their transit. The evidence shows that the reconsignment orders caused a delay during transit of the Spokane shipment of at least eight days and of the Detroit shipment nearly thirteen days. The defendant claims that these delays were of a somewhat longer period.

It is asserted by the plaintiff that certain damage resulted to the Spokane shipment by reason of the fact that about 50 boxes of the oranges were found to be broken and that a large percentage of oranges contained therein were in a badly decayed condition when they were delivered at Spokane. The oranges were packed and loaded upon the cars at Redlands by the shipper, and plaintiff's evidence shows that it was its

practice in loading oranges on cars to fill in unoccupied space in the cars with strips of lumber to prevent the boxes from shifting during transit. The evidence does not disclose what caused the broken condition of these boxes. Whether the decayed condition of the oranges in the broken boxes was caused by the breaking of the boxes, by over-ripeness or otherwise, were questions for the jury.

It is stated for the plaintiff that the cars were billed out to be sold in transit which necessitated possible diversions to different points and this seems to have been the fact. If the evidence in fact did show that the goods were in good, sound condition when delivered to the carrier and were in an unsound state when they arrived at their final destination, these two proven facts would, no doubt, have established a prima facie case for the plaintiff; but we cannot agree with the contention that the record contains no evidence tending to disprove the charge that the carriers were guilty of negligence during the transit of the goods. The evidence for defendant tends to prove that the goods were transported with reasonable promptness from place to place, as directed by reconsignment orders, but that certain delays were caused by these orders given at the request of the shipper, and there is sufficient evidence in the record which tends to support the contention of the defendant that, through no fault of itself or connecting carriers, the goods were unreasonably delayed at the points of final destination by failure on the part of the shipper or its representatives to direct in the one case a delivery of the goods to some person authorized to receive them and in the other by unreasonable delay in accepting delivery of the goods at Detroit.

It is not necessary to extend this opinion by referring to all of the evidence in the record. Part of this

evidence tends to show that deterioration of the fruit was the result of natural causes and tendencies and could be attributed to the delays referred to. It is our opinion that the record before us shows that the verdict of the jury and judgment of the court were based upon contested questions of fact as to which substantial evidence was introduced to sustain both sides of the controversy. It needs no citation of authorities to show that under such circumstances this court will not disturb the judgment of the trial court.

It is contended that defendant, the initial carrier, is liable to plaintiff not only for the negligence of itself or its connecting carriers during the transit of the goods, but also for alleged damage to the oranges which it claimed was caused by negligence on the part of the delivering carrier as warehouseman while the goods remained in its possession at Detroit. We do not deem it necessary to decide this question in the present case. Whether the goods became damaged by freezing while in possession of the connecting carrier as warehouseman, and whether such damage was brought about through the negligence of the delivering carrier, or by the asserted unreasonable delay in the unloading of the oranges by plaintiff's representatives, were questions of fact which were determined by the jury in favor of the defendant. The conclusion of the jury upon this point finds some support in the evidence, and it is also a disputed question of fact in the case whether the damage to the oranges was caused by freezing while on the tracks at Detroit or by other causes.

It is insisted that the court erred in refusing to give an instruction tendered by plaintiff which told the jury that "an act of God is an act of nature which requires entire exclusion of human agency," etc. We are unable to find this instruction in the abstract of record and no denial is made in plaintiff's

reply brief of the assertion made by defendant that the instruction does not appear in the abstract or in the bill of exceptions. We cannot therefore consider this point.

The judgment of the County court will be affirmed.

AFFIRMED.

32 - 25260

Certiorari Denied

THE INTER OCEAN NEWSPAPER COMPANY, a corporation, for use of WILLIAM E. MORRIS,
Plaintiff in Error,

vs.

JOHN R. ROBERTSON,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

216 I.A. 639

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, Inter Ocean Newspaper Company, by this writ of error seeks to reverse a judgment of the Municipal court of Chicago entered in favor of the defendant, John R. Robertson. The case is one of several actions brought by creditors of Chicago Real Estate Show Company to charge shareholders of that company with individual liability for debts incurred by it on the sole ground that it, the Chicago Real Estate Show Company, had failed in compliance with the statute law of the State of Illinois to complete its organization by filing a certificate of its incorporation in the recorder's office of Cook County.

The questions presented to us at this time by the plaintiff are the same as those decided by this court in the case of Hall v. Robertson, 213 Ill. App. 147. April 22, 1911, the plaintiff entered into a contract with the Chicago Real Estate Show Company, under which plaintiff agreed to insert in a newspaper published by it certain display advertising at an agreed rate. The sum of $89.63 was paid to plaintiff on the contract and it brought suit to recover a balance of $1047.37 due thereon. Robertson in his affidavit of merits asserted that the Chicago Real Estate Show Company was a de facto corporation; that it had done business in good faith as a corporation under

its charter; that the contract was made by the corporation and not by its shareholders; that plaintiff and two other creditors had the corporation declared bankrupt in a United States District court; that plaintiff had filed the claim he sues on in the present action in the District court; that he procured an allowance thereof and that he received certain dividends thereon; that afterwards on a petition filed by Lake Superior Paper Company a receiver was appointed for all of the assets and property of plaintiff, and that plaintiff had assigned all of its right and title in the present cause of action.

Every important question presented to us by this writ of error was disposed of in the opinion of Mr. Justice Holdom in the case of Hall v. Robertson, 213 Ill. App. 147. The holdings and reasoning in the opinion in that case are to be adopted here as the basis for our conclusion that the judgment of the trial court should be reversed. Counsel for defendant in their brief say:

> "In support of the judgment of the Municipal court in this case we will make the same points in the same order as were made in our brief and argument in the Hall case, and in addition thereto call the attention of the court to the fact that the Inter Ocean Newspaper Co. was wound up by decree of the Federal District Court under Section 25 of the Corporation Act, and also insist that the words 'amusement rate 40¢ per line' printed at the bottom of the contract is not a part of the contract."

We do not mean, of course, to hold that the decision in the Hall case is res judicata of the rights of the parties to the present suit, but the questions here are almost identical with those in the Hall case; one of the parties here, the defendant, was party defendant in that case, and while we have in the instant case been favored with an elaborate citation of authorities and by able oral and written argument, we are not convinced that the decision in the Hall case was erroneous. It was thought by us

that the decision in the Hall case was in harmony with the decision of the Supreme court in the case of Vestal Co. v. Robertson, 277 Ill. 425, in which the Supreme court in its opinion said that "if they (the creditors) failed to bring their action within the time, they still have their remedy in an appropriate action against the stockholders as partners, in which case the five year statute of limitations applies." It is urged here, as it was in the Hall case, supra, that this statement is obiter dictum. It is conceded that on a petition for rehearing in the Supreme court in the Vestal case, supra, that court was requested to strike the statement above quoted from its opinion and that this request was denied.

The contract which forms the basis of the present suit was for 5000 lines of advertising. This contract was in writing, hence the ten year statutory limitation period is applicable. The action in the Vestal case, supra, was based upon an oral contract. No attempt was made to plead or to prove an alleged winding up of the plaintiff corporation, nor does the record disclose when, if at all, the dissolution of plaintiff took place. The action was brought in the name of the original promisee and the record, as we read it, fails to disclose that its right to bring the action has been lost to it by assignment or otherwise.

Counsel for defendant in error earnestly insist that we should overrule our decision in the Hall v. Robertson case supra, for the reason that neither the "corporators" nor shareholders of a de facto corporation are liable to its creditors who dealt with the corporation on its credit, and no fraud is shown. The entire brief of counsel for plaintiff in error is devoted to a discussion of this question.

Believing as we do that the decision in the Hall

v. Robertson case supra is correct, a judgment will be entered here in favor of the plaintiff for the sum of $1499.75, which includes the sum of $1047.37 with interest at 5 per cent per annum on $980 of above sum from May 7, 1911, to January 12, 1920, 8 years, 8 months, 5 days; and also interest at 5 per cent per annum on $67.37, the balance of above principal sum, from April 22, 1912, to January 12, 1920, 7 years, 8 months, 21 days.

The judgment of the Municipal court is reversed and judgment entered here in favor of the plaintiff for the sum of $1499.75.

REVERSED AND JUDGMENT HERE.

80 - 24937

CONNERY FRUIT COMPANY,
a corporation,
Defendant in Error,

vs.

DELAWARE, LACKAWANNA & WESTERN
RAILWAY COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

216 I.A. 639

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In a trial before court and jury plaintiff had a verdict and judgment thereon for $1192.62, from which defendant prayed and perfected an appeal to this court, and afterwards when the stenographic report was on motion stricken from the record, sued out this writ of error. This appeal is numbered in this court 24260, and on motion both cases were consolidated for hearing and were heard and orally argued together.

Plaintiff's claim is for money damages to a shipment of 332 boxes of lemons and 12 half-boxes of lemons. They were shipped on defendant's road as the initial carrier in car No. 6471 in transit from New York City to Minneapolis, Minnesota. The lemons were, it is averred, in sound condition when received by defendant June 5, 1913, but that they arrived in Minneapolis about June 13th thereafter in a damaged condition and that such damage was caused in part by unreasonable delays in transit, negligent and rough handling, failure to protect the lemons from weather conditions, failure to transport as instructed and to refrigerate the cars in which the lemons were being hauled.

Defendant argues for reversal principally that the amended statement of claim did not state a cause of action; that the verdict and judgment are not supported by the evidence; that

the judgment exceeds the amount claimed in the amended statement of claim; that the verdict was in form assumpsit while the process was trespass; that it was error to deny the motion of defendant to dismiss the case for the failure of plaintiff to file a declaration within three days after the commencement of the suit; errors in the rulings of the court upon the evidence and in refusing to give defendant's instruction No. 8.

The contention that the amended statement of claim does not state a cause of action is made in this court for the first time, and comes too late unless it can be said that the amended statement of claim fails to state any cause of action. The points made on this statement are, that it was not alleged that defendant was a common carrier for hire, that the lemons were delivered to and accepted by defendant for transportation for reward, that the shipment was in interstate commerce, or that plaintiff was the holder of the bill of lading.

It appears from the averments of the amended statement of claim that defendant was a common carrier and was required to exercise that care in transporting the lemons which the law exacts of common carriers. It does appear that the lemons were delivered to defendant and the acceptance will be presumed from the delivery and the issuance of its bill of lading therefor. When plaintiff produced the bill of lading on the trial it was apparent that it was the holder thereof. The bill of lading recites that the goods are to be carried from New York to Minneapolis. From this fact the court will do no violence to judicial discretion in concluding that the shipment was interstate within the meaning of the Carmack amendment to an act to regulate interstate commerce. We therefore think that while all the elements required were not specifically set forth

in the statement, still the amended statement did set forth a good cause of action, although in some respects it was defectively stated. These defects are effectively cured by verdict. In C. I. & L. Ry. Co. v. Monarch Lumber Co., 202 Ill. App. 21, it was held that in an action in the Municipal court of Chicago objections to the sufficiency of plaintiff's statement of claim not made in the trial court cannot be raised for the first time on review, since, if defendant thinks the statement insufficient he may move for a more specific statement, and, failing to do so, impliedly admits the sufficiency of the statement. Jackson v. Burns, 203 ibid 197. Moreover, the amended statement of claim was sufficient to apprise defendant of plaintiff's claim, and in this respect fulfilled the requirements of Section 14 of the Municipal court act.

Defendant raises a constitutional question in arguing its objection that it was error to deny the motion of defendant to dismiss the case for the failure of plaintiff to file a declaration within three days after the commencement of the suit. The point urged is that this being an action of the first class, Section 28 of the Municipal Court Act required plaintiff to file its declaration within three days after commencing suit, and that in default thereof the suit should be dismissed on motion. The rule of the Municipal court making the practice in first class cases conform to that provided by the Act in cases of the fourth class is judicial legislation. Without discussing this question, we will content ourselves by saying that which is patent - this court is not clothed with authority to decide constitutional questions; furthermore, by bringing a cause to this court for review where a constitutional question is involved, such question is, the Supreme court of this State has said, waived. We think, however, that it has been settled contrary to defendant's contention in Israelstam

v. U. S. Casualty Co., 272 Ill. 161, in City of Chicago v. Coleman, 254 ibid 338, and Holmes v. Straus, 204 Ill. App. 307. In the last mentioned case this court held in effect that the adoption by the Municipal court of Rule 14, making the pleadings in first class cases instituted under the Municipal Court Act the same as those in fourth class cases, abolishes practically every difference that existed formerly in the practice and procedure in that court between these two classes of cases.

It is true the judgment exceeds the amount claimed by the pleading. This is accounted for by the statement in the verdict that there was included therein interest at five per cent upon the amount of the claim. It was proper to allow interest. A case very similar in principle is Chisholm v. First National Bank, 190 Ill. App. 354, where the court said:

> "It is also contended that the trial court erred in rendering judgment on the verdict for $10,718.50 when the damages claimed in the declaration are $10,000. The appellant has waived all errors in that regard by not having raised any question concerning it in the trial court. That question may not be first raised in an Appellate court. Wheatley, Buck & Co. v. Chicago Trust & Savings Bank, 167 Ill. 480; Leathe v. Thomas, 218 Ill. 246." Kewanee Nat'l Bank v. Ladd, 175 Ill. App. 151.

This question is initially raised in this court. It is too late.

The contention that the verdict is in form assumpsit, while the process is in form trespass, is, we think, of no consequence on review. It comes too late when made here for the first time. At the most it is highly technical, for the judgment, whether in form of assumpsit or trespass, is of the same purport and in either form the rights of defendant in no way changed to its hurt. If this is an irregularity it is one cured by verdict.

Plaintiff proceeds upon the theory that defendant was derelict in its duty to transport the lemons with due care, in that the shipment was unreasonably delayed in transit, that

there was failure to protect the shipment against the elements because proper refrigeration was lacking, and that the lemons were unskilfully packed and in failing to deliver the shipment in a sound and merchantable condition.

After a perusal of the evidence in this record, we think that the pertinent and admissible testimony therein sustains these contentions, from which the jury and the court were justified in concluding that plaintiff had made out its case as alleged, and such evidence, in our opinion, sustains the judgment.

Defendant contends that plaintiff failed to prove that the lemons were in good condition when received by the defendant railroad for shipment.

Plaintiff offered the bill of lading in evidence, which recites that the goods were received in good order and condition except as otherwise noted, and we find no notation of any part of the shipment being in bad order or condition, so this recital in the bill of lading was sufficient prima facie proof of that fact; and we find no evidence in the record rebutting such recitation in the bill of lading. We think the evidence of plaintiff as a whole sustains the claim that the damage was suffered in transit, owing to defendant's actionable negligence, to the amount of the claim, and that under the Carmack amendment supra defendant was liable as the initial carrier for all damages occasioned by any negligence during the whole of the journey and until Minneapolis, the destination of the shipment, was reached.

The argument as to freight rates is impotent to defeat the express contract of defendant for carriage from New York to Minneapolis.

On the arrival of the lemons in bad condition plaintiff used all reasonable means to minimize the loss, such as examining the lemons, sorting out the good from the bad and repacking

them. This was all the law required plaintiff to do.

The court gave 29 instructions to the jury, and it is insisted that the court erred in refusing to give instruction 8 proffered by defendant.

We think that aside from instruction 8 the jury was sufficiently instructed upon every material point necessary to its decision. Moreover, we think instruction 8 clearly erroneous, as it in effect told the jury that if the agent of plaintiff consented to the lemons being packed in one car, and with such knowledge accepted the bill of lading, plaintiff could not be heard to complain. This is not the law as applied to the facts in this case. In Washington Horse Exchange v. L. & N. R. R. Co., 87 S. E. Rep. 941, it was held that, "Though a shipper examined and deemed a car sufficient for the transportation of horses, the railroad company is not relieved from liability for defects in the car."

We further think that the damages were assessed upon a correct theory regarding defendant's liability.

The judgment in appeal case 24260 is this day affirmed for the reasons that the stenographic report was stricken from the record and that no reversible error appears in the statutory record. Under these circumstances, the judgment in the appeal case being affirmed, defendant may not have any right of further review by this writ of error. However, we have accorded defendant the benefit of the doubt on this point existing in our minds by reviewing the errors assigned in this writ of error case.

Perceiving no reversible error in the record, the judgment of the Municipal court is affirmed.

AFFIRMED.

8 - 24260

CONNERY FRUIT COMPANY, a corporation, Appellee, vs. DELAWARE, LACKAWANNA & WESTERN RAILWAY CO., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 640

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The stenographic report has been stricken from the record in this case. This leaves the statutory record only before us for review. Errors thereon assigned have been considered and disposed of in an opinion coincidentally filed with this in a writ of error sued out to review the same judgment in case general number 24937.

There being no reversible error in the record reviewable on this appeal, the judgment of the Municipal court is affirmed.

AFFIRMED.

8 - 24941

HARRY LIBITSKY,
Defendant in Error,

vs.

ROSE PIKOWSKY, Administratrix of the Estate of Herman Pikowsky, deceased,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

216 I.A. 540

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On the verdict of a jury plaintiff had judgment against defendant's intestate for $251.25 and the administratrix of the estate sued out this writ of error in an effort to have the judgment reversed.

The deceased, Herman Pikowsky, sold plaintiff a ticket for the passage of his wife and children from Russia to Chicago. After forwarding such ticket to Russia and giving plaintiff a receipt for the passage money, Pikowsky, without the consent of plaintiff, procured the ticket to be cancelled, receiving from the steamship company the passage money paid by plaintiff, which he kept and did not repay to plaintiff. The transportation was bought from the Russian-American Line by Herman Pikowsky. The transaction was made through one Benjamin Fishman. Fishman about this time gave Pikowsky a ninety day note. When the note matured Fishman gave Pikowsky a check for the amount of the note, which was returned unpaid and marked, "Not sufficient funds." Fishman subsequently went into bankruptcy and Pikowsky filed a claim for the amount due on the check against the bankrupt estate of Fishman and received thereout a dividend on the amount of his claim, the same as did other creditors. Plaintiff first paid Fishman $100 on account of the cost of the ticket and subsequently went with Fishman to Pikowsky, where the balance of the money due Pikowsky for the transportation was by plaintiff

given to Fishman and by Fishman paid to Pikowsky in the presence of plaintiff; thereupon Pikowsky handed plaintiff the receipt for the passage money, saying to him, "You go home, and your family come about a couple of weeks here in Chicago." Furthermore, Fishman testified that he paid Pikowsky for plaintiff's tickets and that the check given to Pikowsky which was not paid was given for "other merchandise."

The jury and the trial Judge might well believe from the evidence that the foregoing facts were proven. Under these facts plaintiff could maintain an action against Herman Pikowsky for the amount of the judgment as being money had and received from the Russian-American Line for his use at the time he caused said Line to cancel the transportation ticket and received from it the money which plaintiff had theretofore paid for the ticket.

This being an action of the fourth class in the Municipal court, the form of the action is immaterial; the action is whatever the evidence makes it, whether in tort or assumpsit. Schultz v. Ericsson, 182 Ill. App. 487; Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311.

In the circumstances of this case we do not think the question as to whose agent Herman Pikowsky was in the transaction is of any importance. He had money which in right and justice belonged to plaintiff and which he received from the steamship company when the transportation was cancelled, for which transportation plaintiff originally paid Pikowsky. That plaintiff paid the money to Pikowsky appears aside from the oral testimony of plaintiff from Pikowsky's receipt therefor found in the record.

The facts in this record demonstrate that the judgment does justice between the parties. Under these circumstances such a judgment should not be reversed for any technical error of

procedure. Finch v. Wisconsin Dairy Farms Co., 167 Ill. App. 400.

Section 23 of the Municipal Court Act provides that this court shall not reverse the judgment of the Municipal court unless it "shall be satisfied that the judgment is contrary to the law and the evidence or that the judgment resulted from substantial errors directly affecting the matters at issue between the parties." Judd v. Paris, 162 Ill. App. 600; Hamilton v. Tuttle, 157 ibid 345.

The judgment is not contrary to the law or the evidence; nor is it the result of any substantial errors of the trial court directly affecting the matters at issue between the plaintiff and Herman Pikowsky; therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

38 -.25271

JOHN DEMAS,
Defendant in Error,

vs.

PANAGIOTA BOGRIS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

216 I.A. 640

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On the fourth trial before court and jury plaintiff had a verdict and a judgment thereon for $405.90, and defendant seeks a review of the record by writ of error. Plaintiff has failed to appear and defend against the writ.

There are a number of reasons why the judgment of the trial court is fraught with error. In the first place, it was not properly upon the short cause calendar, where it was placed in violation of Sec. 27, chap. 110, R. S., in that the ten days previous notice there required was not given. Statutory rights cannot be divested by rules of court. However, that the cause took more than the statutory time to try would be no reason for reversing the judgment, as the trial Judge might, in the exercise of a sound discretion, continue the hearing of the cause until completed even after the lapse of the statutory hour.

There are also many erroneous rulings of the court in the admission and exclusion of evidence. Moreover, there is an incurable defect in the statement of claim, in that it does not state a cause of action. This may be availed of after verdict, which is not a curative. A cause of action defectively stated is cured by a verdict, but a declaration or statement of claim which fails to state a cause of action is not only not cured by verdict but is open to attack in a court of review.

The statement of claim is abstracted thus:

> "** The statement of claim states that plaintiff expended $405.90, at the instance and request of defendant, for the hospital bills and funeral expenses and bill and on account and for the death of her husband.**"

This does not state a cause of action, because defendant was not primarily liable for hospital bills, funeral expenses or other accounts of the deceased husband. As many of the debts as were contracted by the husband in his lifetime were his debts and not those of his wife, the defendant. The funeral expenses would be a charge upon his estate, and it is reasonably inferable from the evidence that deceased had an estate somewhere in Greece.

Furthermore, there is no averment of a promise on the part of defendant to repay plaintiff for money advanced to defendant's husband. Had such a promise been averred, a plea of the statute of frauds that the promise was one, not in writing, to pay the debts of another would have been a good defense. In Bowman v. People, 114 Ill. 474, it is said:

> "The rule is, if the declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the findings of those which are alleged, a verdict for the plaintiff does not cure the defect."

Foster v. St. Luke's Hospital, 191 ibid 94; McAndrews v. C. L. S. & E. Ry. Co., 222 ibid 232; Quincy Coal Co. v. Hood, 77 ibid 68.

Again plaintiff proceeded in his pleading upon the theory of an implied promise to pay the money advanced and on the trial proved an expressed promise to reimburse, thereby making the case by the pleading an entirely different one by his proofs.

It is an elementary principle of law that the allegata and probata must be in accord.

It appears from plaintiff's testimony that he paid the undertaker $225.65 and that the undertaker had heard a conversation between the parties to this suit, in which the defendant promised to

repay plaintiff. Counsel for defendant attempted in his closing argument to comment upon the fact that the undertaker was not produced as a witness to substantiate such statement by plaintiff, but the trial Judge sustained an objection to such argument. This was erroneous. In the condition of the evidence, there being no attempt to excuse the non-production of the undertaker as a witness, counsel might well comment upon such failure as bearing upon the credibility of the evidence of plaintiff as to the conversation which he testified the undertaker heard between plaintiff and defendant regarding repayment.

As plaintiff is not entitled under his statement of claim to recover in this action, the judgment of the Municipal court is reversed and the cause will not be remanded.

REVERSED.

53 - 25293

JOSEPH J. DELFOSSE, Defendant in Error, vs. ANNA N. KENDALL, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

216 I.A. 640

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause is before us for the second time. (See Delfosse v. Kendall, 205 Ill. App. 314.) The Supreme Court on further review (see 283 Ill. 301) reversed the judgments of this and the trial court and remanded the cause to the Municipal court for a new trial.

The details of the cause of action fully appear in 283 Ill. 301, supra, to which we refer without cumbering this opinion with a repetition thereof.

The Supreme court differed from this court in holding that the trial Judge should have granted defendant's motion to file an amended affidavit of meritorious defense and directed that the court allow the motion and permit such amended affidavit to be filed. This was done and a trial before court and jury resulted in a verdict and judgment for $1575, the principal of the note in suit, and defendant again brings the record to this court for review.

The note is one payable to maker and endorsed and delivered by her.

The amended affidavit of merits alleges in substance that the writing, "Anna N. Kendall" appearing upon the note in suit was obtained from her by false representations and a trick and artifice practiced upon her by one Henry H. Thomas. The trick consisted in Thomas informing her, after her refusal to sign

a note for $1575, that the note which she did sign, namely the one in suit, was for $500 and that by a trick he concealed with his hand the note which she signed, and that she signed the note for $1575 in the belief that it was one for $500.

The principal points urged for reversal relate to the admission of the note in evidence without proof of the several endorsements thereon, that the fraud proven by the testimony of defendant bars recovery, and that the judgment is not supported by the evidence.

Should we concede that the amended affidavit of merits operated as a plea of non est factum, thus putting plaintiff to the proof of the genuineness of the signature of the maker of the note, the defendant, the burthen thus imposed was fully met when defendant testified as a witness for plaintiff that the handwriting on the note, referring to her signature, was hers. Furthermore, the amended affidavit of merits does not deny the genuineness of defendant's signature to the note, but on the contrary avers that the note was obtained by trick and artifice resorted to by one Thomas, at whose instance she executed the note. The endorsements on the note were not denied by any plea or affidavit made by or for or on behalf of defendant. It was therefore unnecessary to prove such endorsements. This case is not comparable on this point to Glickauf, administrator, v. this defendant, 213 Ill. App., 678, where it appeared that the genuineness of the endorsement was denied by an affidavit of merits, making it incumbent upon plaintiff to prove it. Nor was it necessary to prove the delivery of the note. Such delivery will be presumed from the fact of possession.

Section 16 of the Negotiable Instrument Act is applicable in solving this question where it reads:

"* * Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to

him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of the party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proven."

In Woltzen v. Wieman, 168 Ill. App. 220, there was no proof of the delivery of the note in suit, and in answering the arguments put forward for reversal on this ground the court said:

"Appellee introduced a number of witnesses, who testified that the signature to this note was in the genuine handwriting of the deceased, and then offered the note. The note was in the possession of appellee and therefrom a delivery was presumed, and it was expressed to be for value received, which was sufficient proof of consideration, and a prima facie case was thereby made for appellee." Merrill v. Merrill, 187 ibid 589.

Section 26 of the act supra defines a holder for value thus: "When value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time." While plaintiff might have rested in the security of this statutory presumption, he proved the actual consideration paid for the note, which he discounted and paid for at less than its face value. However, it is apparent from the litigation regarding defendant's notes which has passed through this court, that the discount was none too great for the risk of ultimate collection thereby assumed. Adolphus v. Kendall, 205 Ill. App. 316; Glickauf, Admr. v. Kendall, 213 ibid 678. In the condition of the record, the amount which plaintiff paid for the note in no way affects the merits of defendant's defense.

The question of fraud in obtaining the note was one for the jury to determine from all the facts before them. The law required defendant to be reasonably diligent and circumspect in the transaction and not to be guilty of culpable negligence or a want of reasonable care and diligence with respect to the execution of the note. Commercial State Bank v. Judy, 133 ibid 35; Murray v. Metropolitan T. & S. Bank, 159 ibid 473.

Defendant's own testimony showed a lack of care or diligence in the matter of the signing of the note. She made no attempt to read it, according to her own statement, and signed it on a desk cluttered with papers; the covering of the note by Thomas the jury might well have believed was made necessary by such disorderly condition of the papers on the desk at the time of the signing of the note.

In not reading the note defendant was guilty of such a lack of diligence and circumspection as in itself would be sufficient to make ineffective the defense of fraud and trickery set up, for in order to avail of such a defense it was absolutely essential for defendant to prove herself to have been in the exercise of prudence and diligence and to have in no way negligently contributed to the imposition. She attempts to excuse herself for her lack of diligence in the matter on the plea that she was in a hurry to catch a train. Such excuses are not cognizable in courts of law.

The jury had the right to take into consideration in determining the question of fraud the fact that her testimony and her amended affidavit were in conflict. They might further have taken into consideration the fact, testified to by defendant, that she was engaged in making notes with a Mr. H. H. Thomas "to be used for bookkeeping purposes only, and that they would never be used or put on the market in any way." She further testified that she executed four of such notes totaling the not inconsiderable sum of $5,000, as well as other notes of a like character.

We think the jury were amply justified in finding against defendant upon the fraud issue.

Defendant asks this court to add interest to the judgment according to the terms of the note in suit. Failing cross errors, we are impotent to vary in any way the judgment in

favor of plaintiff.

Seeing no reason why the judgment of the Municipal court should be reversed, it is affirmed.

AFFIRMED.

82 - 25332

ABBOTT MANUFACTURING COMPANY,
Defendant in Error,

vs.

M. DENCKER CO.,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

216 I.A. 641

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The bill in this case is primarily a bill to enforce the specific performance of a contract for a lease and to compel defendant to execute a written lease in accord with the contract, for an injunction permanently restraining defendant from prosecuting a forcible detainer suit pending in the municipal court against complainant, and for a money decree awarding complainant such damages as it suffered by reason of defendant's breach of its contract to make certain repairs upon the premises to be demised, etc.

The bill was answered and the cause referred to a master to take proofs and report his findings of law and fact. The master after taking the proofs rendered his report, recommending a decree in accord with the prayer of the bill. Defendant filed objections to the master's report, which were overruled. The chancellor confirmed the master's report and entered a decree thereon, from which defendant prosecutes this writ of error. No exceptions to the master's report were filed before the chancellor.

The bill averred inter alia that complainant was engaged in manufacturing woodwork, using a large amount of machinery; that pursuant to negotiations a contract was entered into between the parties, which provided inter alia that complainant agreed to lease and defendant agreed to let certain premises in Chicago for

manufacturing purposes for five years from May 1, 1914, at an annual rental of $3,000, possession to be given March 20, 1914, without the payment of rent until May 1, 1914, defendant to make certain repairs specified in the contract; that the contract provided for a written lease on a certain form; that after March 24th complainant paid the lessor's agent $250 for May 1914 rent; that complainant did not get possession of the premises until April 10, 1914, when numerous portions of the premises were not in repair; that defendant failed to comply with its agreement to repair and clean the premises; that because of such failure complainant on April 13th placed a force of laborers on the premises and did the cleaning and repairing which defendant had promised by its contract to do; that about April 1, 1914, defendant presented a written lease, signed by it, and requested complainant to execute the same, which it refused to do because the lease contained a covenant that the premises were in good repair; that complainant was compelled to expend about $800 in repairing the premises and lost approximately $2,000 through the failure of defendant to make such repairs; that defendant on June 20, 1914, caused to be served upon complainant a five day notice, demanding $250, and notified complainant that if that sum was not paid within said five days its rights in the premises would be terminated; that on June 20, 1914, defendant started a forcible entry and detainer suit in the Municipal court to dispossess complainant of the premises set forth in the contract for a five year lease; that complainant expended more than $3,000 in moving into the premises; that as the renting season had passed complainant was unable to obtain suitable premises and in consequence would sustain irreparable loss and injury if dispossessed by having its business interfered with if compelled to seek other premises; that said premises were heavily encumbered; that defendant had no means, assets or property and

could not respond in damages for breach of contract in a proceeding at law; that in an effort to avoid its contract to lease, defendant instituted and is prosecuting the forcible detainer proceeding aforesaid; that complainant tenders the $250 demanded in the notice with any other payments that may accrue and also a bond for the payment of rent, expenses, etc., that may accrue to defendant, and is willing to comply with any other terms imposed by the court, so that complainant and defendant may both be protected in their rights; prays that defendant be required to answer; that a temporary injunction be entered restraining a further prosecution in the Municipal court of the forcible detainer suit, and also restraining the defendant from interfering with the possession by complainant of the premises; that defendant be required to enter into a lease in accordance with the contract and to fully and specifically perform the same; that there be an allowance for all expenses, loss and damage sustained through the neglect of defendant to perform its part of the contract for a lease, and that the amount found due complainan be decreed to be paid to it or applied against the rent which may accrue to defendant.

It is contended that the bill is not supported by the evidence in the record.

Defendant does not dispute the force and effect of the proofs, and therefore has not abstracted the same or any part thereof. The errors argued are embraced in the contention that a court of equity had no jurisdiction because complainant had a complete and adequate remedy at law.

The contention that the bill did not state a case cognizable in equity is made in this court for the first time. The bill was not demurred to nor was the equitable jurisdiction of the court challenged by any averment in the answer. Furthermore, no such objection was made at any of the several hearings

before the master or upon the final hearing before the chancellor.

The specific performance of a contract can only be obtained by resorting to the equity branch of the court. No such action is cognizable at common law; therefore, as to this portion of the bill a court of equity had jurisdiction.

Restraining the prosecution of the forcible entry and detainer suit was but ancillary to the relief sought for the specific performance of the contract for a lease, as likewise was the prayer for the assessment of damages which complainant had suffered by defendant's breach of its lease contract.

It is axiomatic that when a court of equity obtains jurisdiction of a cause for one purpose it will proceed to do complete justice between the parties upon equitable principles as affecting the subject matter of the litigation. Complainant averred and proved that it could have no adequate relief at law against defendant for its damages, because defendant was financially irresponsible and could not be made to respond in damages in a suit at law. It is therefore quite clear that complainant stated a case by its bill which entitled it to relief in a court of equity for the grievances set forth in the bill and alleged against defendant.

Defendant argues with much force that equity cannot enjoin the prosecution of a suit at law in forcible entry and detainer. To this contention we are unable to yield our assent. Monson v. Bragdon, 159 Ill. 61, is authority contrary to such contention. In the Monson case the court held that if complainant had a complete remedy at law, the objection to be availed of should have been set up by way of demurrer or answer to the bill, which was not done; the opinion then proceeds thus:

"We are of the opinion, therefore, that the Superior court erred in dismissing the bill and dissolving the injunction, and should have entered its decree in conformity with the prayer by ordering a conveyance of the property upon compliance by Benson with the terms of the contract, and perpetually enjoining the prosecution of the action of forcible entry and detainer."

In the state of the record we must assume that the proofs establish the fact that complainant would suffer irreperable injury unless given the relief sought by its bill and that its remedy at law was inadequate. Jackson H. T. Co. v. A. & S. Ill. Tel. Co., 100 Ill. App. 535; Carlson v. Koerner, 226 Ill. 15; S. F. B. Co. v. G. C. S. Co., 223 ibid 616.

The failure of defendant to challenge the jurisdiction of the court to grant the relief prayed in its pleading brings the case within the rule announced in Crawford v. Schmitz, 139 Ill. 565, where the court held:

"The rule is that where a defendant thus appears and voluntarily submits himself to the jurisdiction of a court of chancery, the court may, if it sees proper, proceed to grant relief, notwithstanding there may be an adequate and complete remedy at law, if the relief sought is not of such character as to be wholly foreign to chancery jurisdiction." Stout v. Cook, 41 Ill. 447.

The objection to the jurisdiction of the court made by defendant by way of objection to the master's report came too late, as, by answering, it had already submitted itself to the court's jurisdiction.

For the foregoing reasons the decree of the Superior court is affirmed.

AFFIRMED.

220 - 25476

EQUITABLE SECURITIES COMPANY, ET AL.,
vs
MIDLAND CASUALTY COMPANY

IN RE PETITION OF CHARLES A. WHITE,
Appellee,
vs
EQUITABLE SECURITIES COMPANY, JOHN L. HAMILTON, A. M. EAREL, and MIDLAND CASUALTY COMPANY,
Appellants.

216 I.A. 641

MR. JUSTICE O'CONNOR DELIVERED THE OPINION of the Court.

The question to be decided is whether the demurrer filed to a plea of release of errors should be sustained or overruled. The question then, of course, turns on the sufficiency of the plea.

So far as material, the plea avers that a decree was entered in the Circuit Court of Cook County awarding $8000. to appellee, Charles A. White, and that it be paid by the Receiver appointed in that case; that from this decree the demurrants prosecuted an appeal to this court where the matter is now pending. The Receiver did not appeal from the decree. It is further averred that demurrants were stockholders in the Midland Casualty Company, for which company the Receiver was appointed, and that the $8000., when paid, would be paid from the property of that company; that after the entry of the decree and after the perfection of the appeal in this court, the Receiver filed his petition in

the case in which he was appointed, wherein he alleged that a Wisconsin corporation, by reason of a contract entered into by the Midland Casualty Company and the Wisconsin company, was liable to the Receiver for the amount of the decree, and he asked leave to institute proceedings against the Wisconsin company for the recovery of such amount; that an order was entered authorizing him to bring the suit and that afterwards in accordance therewith, a suit was instituted in the Circuit Court of Cook County against the Wisconsin corporation; that an attachment in aid of that suit was issued and served on a garnishee in Cook County; that the garnishee answered admitting indebtedness to the Wisconsin corporation; that in that suit the Receiver filed a bill of particulars showing that it was brought to recover from the Wisconsin corporation the $8000. awarded White. It is further averred "that the suit was instituted and is being prosecuted and controlled by Frank F. Joyner, Receiver, and further that said suit was instituted and is being prosecuted by said Receiver with the knowledge, approval and consent of appellants (demurrants) herein", and that the suit is for the use and benefit of the Midland Casualty Company of which demurrants are stockholders.

The demurrer sets up as special grounds that the plea alleges matters that occurred prior to the entry of the decree in the Circuit Court; that it is frivolous and does not constitute a plea of release of errors "in that said matters and things so set forth do not, nor do any of them, answer assignments of error upon the record or any of such assignments." The first point is clearly untenable, for the plea would be unintelligible unless some facts were

alleged that took place prior to the decree. The argument in support of the second ground of demurrer seems to be that the plea is in no sense one of a release of errors in that it does not purport to answer the assignments of error. The form of plea here filed has been repeatedly held sufficient by the Supreme Court, Corwin vs Shoup, 76 Ill. 246, Lott vs Davis, 263 Ill. 148, Langher vs Glos, 276 Ill. 342. A plea is sufficient if it sets up facts that show the parties appealing from the decree or judgment have subsequently accepted the benefits of the decree or judgment.

Another special ground of demurrer made is that the plea fails to allege that the demurrants have accepted the benefits of the decree. In reply to this it is said that it appears from the allegations of the plea that the Receiver is suing another company to recover $8000., the amount of the decree and that he sued out a writ of attachment in aid of that suit, and the garnishee there served admits indebtedness to the defendant company in that suit. That these facts are admitted by the demurrer and "indicate the acceptance of considerable benefit from the decree, and that if the Receiver thinks well enough of the validity of the decree ******** to base a suit for reimbursement on it and resort to the unusual relief of an attachment in aid, appellants (demurrants) whose rights are all derived from the Receiver, cannot at the same time be heard to urge reversal in this court." We think this argument is unsound, for if the demurrants had a right to appeal from the decree, and no point is made that they have not such right, then that right could not be taken away from them by the Receiver.

This would be the result if counsel's argument were followed.

But we find on examination of the plea that it is averred that the suit against the Wisconsin corporation is being prosecuted by the Receiver "with the knowledge, and approval, and consent of" demurrants. We are of the opinion that this allegation, on which we think the sufficiency of the plea turns, does not add anything to it. The plea avers that the suit was instituted after the court had authorized it on the Receiver's petition, and the fact that it was being prosecuted by the Receiver with the knowledge, approval and consent of the demurrants would in no way affect the prosecution of that suit. The Receiver did not need the approval or consent of the demurrants, and whether they gave it or withheld it, so far as the plea shows would not affect the actions of the Receiver in prosecuting the suit.

We think the plea fails to allege sufficient facts in that it does not appear that anything demurrants have done has aided or assisted in any way the prosecution of the suit against the Wisconsin corporation.

The demurrer to the bill will, therefore, be sustained, and the Appellees are given leave to join in error, if they so desire, and to file their briefs within the time heretofore allowed.

DEMURRER SUSTAINED.

MR. PRESIDING JUSTICE THOMSON DISSENTING:

I am unable to concur in the decision announced in the foregoing majority opinion. The Equitable Securities Company and others, stockholders in the Midland Casualty Company, filed a bill against that company to wind up its

affairs. White filed an intervening petition setting up an alleged claim against the Midland Company, and on the petition, the Court entered a decree allowing the claim and requiring the Midland Company to pay White the sum of $8000. In connection with the original case, a Receiver had been appointed. The Receiver did not appeal from the decree in favor of White, but the Midland Company and some of its stockholders did perfect the pending appeal from the White decree.

In the suit later begun by the Receiver of the Midland Company against the Midland Casualty Company of Wisconsin, (in which it is alleged that the latter company is liable for the amount of the decree recovered by White, by virtue of a reinsurance contract existing between the two Casualty Companies), the plea of release of errors alleges the Receiver filed a bill of particulars stating that the suit is brought to recover the $8000. adjudged by the court to be paid by the Receiver to White under and by virtue of the decree from which the appellants, stockholders in the Midland Casualty Company, and the company itself, are prosecuting this appeal.

The plea of release of errors further alleges that the suit against the Wisconsin company is being prosecuted by the Receiver "with the knowledge, and approval, and consent of appellants herein" and that said suit is for their use and benefit.

It is not a question of whether the Receiver <u>could</u> prosecute the suit against the Wisconsin company without regard to the attitude of these appellants. Under the allegations of the plea, which are admitted by the demurrer,

these appellants asserting error in the decree and praying its reversal here, are alleging its validity and binding force in the suit against the Wisconsin company, through their representative, the Receiver, by reason of the fact that he is prosecuting that suit, not over their protest or in spite of their request that he refrain until this appeal may be determined, but as the plea alleges and the demurrer admits, with their "knowledge, and approval and consent."

By affirming the decree and taking advantage of the reinsurance contract with the Wisconsin company in a suit, based on the validity of the decree, brought by the Receiver, (who is the only one who could bring the suit representing these appellants), and securing benefits under that suit, as the plea shows to be the case, in tying up funds of the Wisconsin company in this jurisdiction, in my opinion, the appellants have released the errors alleged by them on this appeal and, therefore, I believe the demurrer should be overruled and the plea of release of errors should be held to be good.

110 - 25364

CITY OF CHICAGO,
Defendant in Error,

vs.

GEORGE CHANDLER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

216 I.A. 641

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

The defendant, Chandler, charged with being the keeper of a disorderly house located at No. 500 North Clark street in Chicago, in violation of section 2019 of the Chicago Code, was upon trial by the court found guilty and fined $100.

He asks this court to reverse the judgment on the ground that it is not supported by the evidence. We have considered all the evidence and the arguments of counsel thereon and are of the opinion that the charge as to the character of the house was sufficiently proven. This was established not only by the testimony of the officers but by the definite testimony of the young men who were guests at the time in question.

It is also established that the defendant, Chandler, knew of the disorderly character of the place by the testimony of these same young men that he had directed some of them to a room occupied by a prostitute. This is denied by the defendant; yet the trial Judge having seen the witnesses was better qualified to judge of their credibility than are we, and we shall not differ from his conclusion.

There were no reversible errors committed upon the trial. As the case was tried by the court and the finding was

abundantly supported by competent evidence, errors, if any, in the admission of testimony are not important.

There is no authority for the proposition that the guilt of the defendant must be proven beyond a reasonable doubt. It has been decided to the contrary in City v. Stone, 187 Ill. App. 90, where it was held that the violation must be proven, like any ordinary city suit for the recovery of a penalty, by a clear preponderance of the evidence.

Nothing affecting the propriety of the finding can be derived from the fact, if it is a fact, that the City did not introduce all of the evidence which might have been procured.

As the finding was justified by the testimony and there were no reversible errors on the trial, the judgment is affirmed.

AFFIRMED.

134 - 25388

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOHN DIXON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

216 I.A. 641

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

The defendant, Dixon, asks for the reversal of a judgment against him finding him guilty of a misdemeanor and sentencing him to the House of Correction for six months. It was charged that on July 29, 1919, he

> "did then and there assemble upon the streets of the City of Chicago, for the purpose of disturbing the peace or committing any unlawful act contrary to the form of the statute in such case made and provided, and against the peace and dignity of The People of the State of Illinois."

It is conceded by the attorney for The People that this charges no crime known to the law.

After finding defendant guilty of this charge and the imposition of sentence it was ordered by the court that the information be amended to read as follows:

> "John Dixon did then and there assemble upon the streets of the City of Chicago with unknown persons, for the purpose of disturbing the peace or committing any unlawful act contrary to the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

We know of no authority for the practice of amending an information after judgment and sentence. Long v. The People, 135 Ill. 435, does not decide that this may be done.

We do not think this cured the information; at least we find nothing in the Criminal Code making such conduct a crime. If this was an attempt to charge defendant with a violation of section 252, chapter 38, it omitted the important element of the refusal of the assembly to disperse upon command of an officer.

Another fatal defect is that the evidence does not support the charge. It was shown that defendant, from a window of a room, in which he was alone, of a third floor flat, fired a gun, wounding an officer. He might properly have been indicted for an assault with a deadly weapon. In any event, the judgment in the present case cannot stand and it is reversed.

REVERSED.

146 - 25400

CHARLES H. RAVELL,
Appellee,

vs.

EVENING AMERICAN PUBLISHING COMPANY,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

216 I.A. 641

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was employed by the defendant as an advertising man upon a basis of weekly salary plus a bonus depending upon the amount of advertising procured. The aggregate of this bonus for the year 1914 was $600.70. A dispute arose as to whether this had been paid and. not agreeing, plaintiff brought suit and upon trial by a jury had a verdict and judgment for the full amount of his claim, $600.70, from which defendant appeals.

The contract of employment was evidenced by two letters, the first dated December 22, 1913, from the defendant to plaintiff, stating among other things that plaintiff's salary would be $65 a week and also a bonus at a certain rate per line for an increase in advertising over a certain amount. The letter provided that "The bonus for 1914 will be paid you in weekly installments during the year 1915, same being added to your weekly check." The letter also said, "At the end of the year 1915, we hope to make another arrangement with you along the same lines." This proposition was accepted by plaintiff by his letter written the following day.

Plaintiff proceeded to perform the duties of his employment during the year 1914, at the end of which time he

had earned, as above stated, $600.70 as a bonus. During the year 1915 he received a weekly payment of $72.50; he attempted by his testimony to prove that this was for salary only, the excess over $65 a week being an increase in salary. The defendant's testimony tended to show that this excess was paid to plaintiff as instalments to be credited upon the amount of the bonus due him, and paid in this way pursuant to the contract of employment.

The contract is not ambiguous upon this point; it is clearly provided that any bonus earned in 1914 shall be paid in weekly instalments during 1915 to be added to the weekly salary check. This is so obvious as not to require argument. Accordingly we hold that the aggregate of the excess weekly payments in 1915 over $65 a week must be credited on account of the amount due plaintiff for his bonus. This amounts to a credit of $390, which would leave a balance unpaid of $210.70.

The above conclusion is supported not only by the proper construction of the contract, but also by a written statement of account made by the plaintiff and rendered to the defendant in which this weekly instalment of $7.50, aggregating $390, is credited as a payment on the bonus account.

Plaintiff continued to work for defendant for 30 weeks in 1916, during which time he received a weekly pay check for $75. Defendant claims that this excess of $10 a week, aggregating $300, should be credited upon this bonus account. It is not clear why this should be done. The evidence as to the cause of this increase is very meager. Plaintiff says that beginning in January, 1916, he began to receive, without his request, a weekly pay check for $75; that it was "at the time they made the raise for everything."

In face of defendant's undertaking by its letter of December 22, 1913, to pay the bonus of 1914, meaning all of it, in weekly instalments during the year 1915, we cannot conclude that the excess payments in 1916 were intended to apply upon the bonus account of 1914.

There were errors upon the trial which would require a reversal. These should not occur upon another trial if another trial should be had. Plaintiff is not entitled to recover more than $210.70. For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

155 - 25409

C. A. WATSON & SONS, a corporation,
Appellee,

vs.

AMY KRAMER, JOSEPH KRAMER, WILLIAM KRAMER and MORRIS MAGES, copartners, doing business as KRAMER BROS. & MAGES,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 642

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants by this appeal seek the reversal of a judgment against them for $121.50, entered after a trial by the court. The only questions are those of fact, and as the trial Judge saw the witnesses we do not feel disposed to differ from his conclusions.

Both parties are dealers in market products. Upon the evidence the court could properly find that plaintiff had a carload of potatoes, invoiced at 200 barrels; that the car was wrecked, damaging some of the potatoes; that the lot was sold to the defendants at $2.70 a barrel, although the market price was $3.75 to $4 a barrel; that the reduced price was on account of the damaged condition. Plaintiff subsequently asked payment for 200 barrels at the agreed price, but defendants claimed that in rehandling they got only 155 barrels out of the lot, and having sent a check for this amount they declined to pay the balance. This suit is for the balance.

It is clear that the purchase was in the nature of a speculation by the defendants; they were to take the entire lot at the reduced price, knowing that the car had been wrecked. As one of the defendants said, "This price was made because the stuff was not good." They must therefore abide by their contract to pay for

200 barrels even if, in rehandling, it developed that the quantity of damaged potatoes was larger than they anticipated.

There is also evidence that when plaintiff made a demand for the balance due, one of the defendants, after some talk, promised to send a check for same.

The claim of the defendants that the check sent in payment for 155 barrels was accepted in full settlement by the plaintiff is not supported by the evidence. This check was neither tendered nor accepted as a payment in full.

There is no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

177 - 25432

JAMES F. BISHOP, Administrator of Estate of WILLIAM ALBERT SCHIELE, deceased, Plaintiff in Error, vs. CHICAGO RAILWAYS COMPANY, a corporation, Defendant in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

216 I.A. 642

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of an adverse judgment upon a directed verdict in an action brought to recover compensation for the death of William Schiele, who had been a passenger on one of defendant's street cars and who in some manner either fell or was thrown from the rear platform onto the street, receiving the injuries which caused his death.

The declaration in 5 counts charged that defendant's car was suddenly increased in speed, jerked and propelled forward, propelled with the side of the rear platform open and unenclosed without any protection to passengers against falling off or being thrown off while the car was in motion; that the car operated upon a defective roadbed, and was operated upon a curve with an unreasonable rate of speed. At the conclusion of plaintiff's case, upon motion of the defendant, the court instructed the jury to bring in a verdict of "not guilty," which was accordingly done and judgment was entered upon the verdict.

The testimony supporting plaintiff's allegations of negligence is in a small compass. The car was described as an open "pay-as-you-enter" car; that is, the entrance side of

the rear platform was not enclosed. None of the cars on this line at this time had this entrance enclosed.

The accident happened about 9:30 p. m., December 23, 1915. The car was going north on Clark street in Chicago. It stopped at Belden avenue, an east and west street, and decedent boarded the car. The only witness to the occurrence said that he saw the decedent get on, saw him put his hand in his pocket to pay his fare; that apparently he dropped the fare and made a motion to pick it up; that he then heard a woman scream and the conductor's emergency signal to stop; that witness and the conductor walked back about a car's length and found decedent lying on the ground. The witness said, "I don't know exactly what happened."

There was an entire absence of any evidence as to negligent operation of the car with reference to speed or the manner of its movement, and no evidence as to a defective roadbed, or that the accident happened at any curve. While there is some evidence as to a curve near Fullerton avenue, the street next north of Belden, there is no evidence whatever that the car had reached the curve when the accident happened. The plaintiff's witness testified that the car was running in the usual and ordinary way.

The only evidence tending to support any allegation of negligence was that the entrance side of the rear platform was open and unenclosed. We find no case in which it has been held that it was the duty of a carrier as a matter of law to enclose the platforms of its cars. On the contrary, the law seems to be well established that there is no such duty upon carriers. The rule is stated in 7 Thompson on Negligence, 3483:

> "A street railroad company will not be imputed with actionable negligence by the mere fact that it allows passengers to occupy its platform, or allowing this use of the

platform, fails to protect the platform with gates."

Among the many cases supporting this rule are Byron v. Lynn and B. R. Co., 177 Mass. 303; Slotofski v. Boston El. Ry. Co., 215 Mass. 318; West Phila. Pass. Ry. Co. v. Gallagher, 108 Pa. St. 524, 529; Bridges v. Jackson El. Ry., L. L. & T. Co., 86 Miss. 584; Bronson v. Oakes, 76 Fed. 734, 740; Sansom v. So. Ry. Co., 111 Fed. 887; Augusta Rys. Co. v. Glover, 92 Ga. 132; St. L. I. M. & S. Ry. Co. v. Oliver, 92 Ark. 432; Crandall v. M., St. P. & S. S. M. Ry. Co., 96 Minn. 434; 8 Thompson on Negligence, section 2785. In Blair v. C. C. & P. R. Co., 205 Ill. App. 160, it was held that even where a vestibule train was provided, it was not negligence to have the doors open between stops unless some special reason appears for keeping them shut.

Following these cases, we hold that proof that the rear platform of defendant's car was at the time of this occurrence open and unenclosed is no evidence of negligence, as there was no duty upon defendant to enclose the platform.

The res ipsa loquitur rule cannot be invoked. Specific acts of negligence were charged against the defendant; there were no general charges; in this state of the pleadings the doctrine cannot be invoked. Crawford v. C. U. T. Co., 137 Ill. App. 163; and cases there cited. Furthermore, the open platform was visible and known to the passenger at the time he boarded the car. Under such circumstances the passenger is required to take reasonable care for his own safety. 2 Thompson on Negligence, sec. 2763.

There is evidence tending to show that the decedent was stooping down to pick up a fare which he had dropped. It is a reasonable inference from this that through his own motion he fell from the platform. The res ipsa loquitur rule does not apply where the occasion of the accident was an active, voluntary movement by the injured person, combined with an alleged insufficiency in the

carrier's means of transportation. 3 Thompson on Negligence, sec. 2764; Ferrier v. C. Ry. Co., 185 Ill. App.326; McFadden v. Chicago. R. I. & P. R. R. Co., 149 Ill. App. 298; Barnes v. Danville St. Ry. Co., 235 Ill. 566.

In Jones v. Chicago City R. R. Co., 147 Ill. App. 640, the court said:

> "If plaintiff fell from the car as the car was running in the usual manner, with only the ordinary motion or swaying of the car, he has no right of action against the defendant for injuries sustained by such a fall."

Plaintiff's evidence entirely failed to prove any of the allegations in the declaration of any actionable negligence which caused the accident.

It is a fair inference that the decedent fell from the platform because of his own hurried movement in attempting to recover his money accidentally dropped.

Considering the evidence on the part of the plaintiff as true, and with all just inference drawn therefrom most favorable to plaintiff, it fails to make out a prima facie case. Under such circumstances it was the duty of the trial court to instruct for the defendant.

For the above reasons the judgment is proper and is affirmed.

AFFIRMED.

186 - 25441

E. F. WITT,
Appellee,

vs.

C. F. WENHAM and PAUL H. WILLIAMS, doing business as The Chicago Oil Exchange, and The Chicago and Western Oil Exchange,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 642

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Upon a trial before court and jury, plaintiff had judgment against the two defendants, C. F. Wenham and Paul H. Williams, for $500, from which they appeal. The cause was originally in assumpsit but was amended to become an action in tort. B. H. Mason was originally made a co-defendant but was not served, and the case was dismissed as to him.

The gist of the action was that the defendants represented that they were acting on behalf of The Chicago Oil Exchange and also of The Chicago Western Oil Exchange, which were represented to be incorporated under the laws of Illinois, which representations they knew to be false; that relying upon said representations, the plaintiff was induced to pay $500 upon promise to issue and deliver to him 5 shares of stock in The Chicago Oil Exchange, but that no stock had ever been issued, tendered or delivered to the plaintiff. We are of the opinion that plaintiff failed to prove this claim and that the evidence fails to show that the defendants or either of them ever made any representations concerning these companies to the plaintiff or had any communication with him concerning the issuance of stock, and in fact had no official connection with said corporations and

received none of the money alleged to have been paid by plaintiff.

It seems to us quite clear that the evidence establishes that the entire business of the two corporations, whatever it was, belonged to B. H. Mason, who had his office at 177 North Clark street, Chicago; that the plaintiff got in touch with Mason through an investment agency, the character of which is not made clear, but defendants were not connected with it; that he called on Mason and November 15, 1917, entered into a written contract which was signed by the plaintiff and by "B. H. Mason, for The Chicago Oil Ex." By this contract the first party (Mason) agreed to issue to the second party (Witt) 5 shares of stock of The Chicago Oil Exchange for $500 cash. Witt was also to act as sales manager at the main office or in any branch office.

Plaintiff's suit is based upon this contract, but he has wholly failed to show that the defendants, Wenham and Williams, were in any way parties to it. The only connection Wenham had with Mason and his oil companies was as follows: Wenham was manager of the Chicago Safe & Merchandise Co., which fitted Mason's office with furniture upon a rental contract of $250 a month, the collection of which brought Wenham occasionally into Mason's office, but Wenham did not know Witt and never saw him until the day of the trial.

A letterhead was introduced in evidence, bearing Wenham's name, but Wenham denied that his name was placed thereon with his authority, and testified that the first time he had seen or known of such letterhead was when it was shown to him at the trial. The fact that Wenham's company sold the furniture for Mason's office and the fact that Wenham may have occasionally been seen there afford no ground whatever for any conclusion that he

was a party to the contract with Witt or was one of the principals interested in the oil companies.

Williams' connection with the matter is equally tenuous. The evidence shows that Williams had much the same connection with The Chicago Oil Exchange as did the plaintiff; that is, he was employed as cashier and bookkeeper; he had a contract with Mason for the purchase of stock and employment substantially like plaintiff's contract. There is no evidence whatever that either Wenham or Williams ever made any representation to the plaintiff or had any dealings with him of any kind or received any part of the money paid by the plaintiff to Mason. The evidence demonstrates that Mason was the sole promoter and manager of the enterprise, and that the money received from plaintiff as well as from others he induced to invest went into and remained in his pockets.

We cannot agree with the finding of the jury that the facts justify recovery from the defendants, hence the judgment of the Municipal court is reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

FINDINGS OF FACT.

We find as facts that the defendants, C. F. Wenham and Paul H. Williams, did not hold themselves out as acting for and on behalf of The Chicago Oil Exchange or of The Chicago and Western Oil Exchange, and did not represent them to be incorporated under and by virtue of the laws of the State of Illinois; that plaintiff was not induced by any representations made by the defendants or either of them to part with $500 upon the promise that there should be issued and delivered to plaintiff 5 shares of stock in said corporations or either of them; and we find as a fact that neither of the defendants represented or claimed to represent said corporations; and we also find that neither of them at any time made any representations whatever to the plaintiff concerning said companies or entered into any contract or agreement with him concerning them or stock therein, or received any moneys or part thereof which plaintiff may have paid for such stock.

230 - 25487

ARTHUR W. GUTHAUS,
Appellee,

vs.

EUGENE GOLDMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

216 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming commissions due him while employed by defendant as a salesman of automobile trucks, and upon trial had a verdict and judgment for $309, from which the defendant appeals.

The only point argued in defense is that the plaintiff took a Flanders automobile without permission of the defendant and retained the same. Plaintiff testified specifically that the defendant told him to take an old Flanders car, along with another, and fix it up and try to sell it, and that it was taken under this authority.

A special interrogatory was submitted to the jury as to whether plaintiff had misappropriated this automobile, which was answered in the negative.

The jury had the opportunity to see the witnesses and to weigh their variant stories, and we have no sufficient grounds for disagreeing with its judgment as to their credibility. This is the only point made in defense and we shall leave the conclusion of the jury thereon undisturbed.

AFFIRMED.

231 - 25488

CHARLES C. SMITH,
Appellee,

vs.

EUGENE GOLDMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

216 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff upon trial by the court had judgment against the defendant for $700, which defendant seeks to have reversed, but upon the record before us it must be affirmed.

Among the reasons for affirming are: (1) The abstract, which is the pleading of the appellant, gives us no information as to the issue. The action is described as replevin, with a count in trover and "Affidavit of merits." This gives us no information as to the subject matter of the suit nor the character of the defense. (2) The relations between the plaintiff and defendant seem to have been established by some four writings which were introduced as exhibits. None of these is abstracted. In the absence of information as to their contents we shall assume they were sufficient to establish plaintiff's claim. (3) The only point argued is the sufficiency of the evidence. After giving it consideration we see no sufficient reason to disagree with the conclusion of the court.

The subject matter of the suit apparently was a "two-ton Republic Motor Truck." There seems to be no dispute as to the fact that on December 30, 1918, the plaintiff made a contract with The Chicago Beverage Company to sell it three "Master Trucks" and to receive as part of the purchase price three used trucks, one of them being the Republic truck, the subject matter of this suit. To carry out this sale, plaintiff purchased the

"Master Trucks" in his name and delivered them to The Chicago Beverage Co., receiving the consideration therefor in cash and the used trucks. Defendant seems to rely upon an oral arrangement between him and plaintiff, whereby the profits of this deal were to be divided, the defendant to get the Republic truck as his share. The stories of the plaintiff and the defendant upon this point were in direct contradiction.

The trial court saw and heard the witnesses and could better judge as to credibility than we can. We cannot say its conclusion as to which story was better entitled to belief was improper.

For the above reasons the judgment is affirmed.

AFFIRMED.

79 - 25327

STANLEY WENZ, Administrator of Estate of JOHN STEINERT, deceased,
Appellee,

vs.

FRANK OECHSLIN,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

216 I.A. 643

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered in the Superior court of Cook County in favor of the plaintiff for $3,500.

Plaintiff's intestate, a boy 10 years of age, received injuries which caused his death by being stuck by a one-ton motor truck owned by defendant while deceased was in the act of crossing West Division street at its intersection with North Hermitage avenue in Chicago.

The counts of plaintiff's declaration upon which the case was tried charge that the defendant was guilty of negligence which caused the injuries to and death of deceased, in driving the motor truck at a high and dangerous rate of speed in violation of Illinois statutes; by negligently operating the motor truck and by a negligent failure to keep a sufficient look-out and to sound a horn, etc.

The evidence introduced upon the trial shows that on the morning of May 8, 1917, an employe of defendant was operating the motor truck, east on West Division street, delivering pot plants to certain customers of defendant. Plaintiff's intestate and several other boys in going to their homes from school, just before the time of the accident, were riding in a horse-drawn truck wagon which was being driven west on

West Division street. West Division street extends east and west and North Hermitage avenue north and south. The latter street does not, however, cross West Division street but runs south therefrom. Two or three of the boys got off the wagon at North Paulina street about a block east of the scene of the accident. Deceased and two other boys remained on the wagon until it reached North Hermitage avenue. Deceased got off at a point opposite to and a short distance west of the west line of North Hermitage avenue and was proceeding in a southeasterly direction to the south side of Division street when he was struck by the east bound motor truck. The accident happened at about 12 o'clock noon. The evidence tends to show that the accident occurred in a closely built up business district; that there are two schools located in the neighborhood, one situated about two blocks west and the other about two or three blocks east of Hermitage avenue and that at the time and near the place of the accident there were numbers of school children on and about the streets and sidewalks. Three of the boys, including plaintiff's intestate, started across West Division street to the south side thereof, and certain testimony is to the effect that at this time the motor truck was about five doors west of Hermitage avenue and that plaintiff's intestate as he crossed the street looked toward the west.

Two street car tracks are laid down on West Division street, the south one of which was known as the east-bound track. After the accident deceased lay between this track and the south curb on Division street, at a point opposite a milk depot located on the southeast corner of Division street and Hermitage avenue.

One Gorden, a teamster, who appears to have no in-

terest in the case, testified that the automobile was, at and just before the time of the accident, moving at a speed of from 20 to 25 miles an hour; that no horn was blown nor signal given before the boy was struck. This witness and other witnesses testified that the motor truck stopped, after the accident, at an elevated railway station which was located about five lots or stores east of the point where the accident occurred.

Albert Krefta in testifying said:

> "Myself and two other boys got off at Paulina street. Four boys were left on the wagon, and one was John Steinert. After we got off we stood on the street waiting for the boy. Czerniak, Gorski and then Johnny Steinert got off. The wagon at this time passed the west of Hermitage. He held himself on the wagon and he fell on his knees to get off. He went southeast toward the south side of Division street. Then somebody from the 'L' station hollered 'Hey,' and he looked at the wagon, and when the automobile was coming it just struck him on the side and rolled him over."

John Gorski testified that:

> "The wagon was driving west on the car track. When we came up to Paulina street, three boys got off. I stayed on until we reached Hermitage. Harry Czerniak and Johnny Steinert were on the wagon as we came up to Hermitage. In front of Schultze's milk depot, Harry Czerniak helped Johnny get off. I crossed the street going south, towards the south sidewalk. Harry Czerniak and Johnny Steinert cross the street going south ahead of me. They were walking together. Harry Czerniak crossed the street sooner than Johnny Steinert did. At the time John Steinert got off of that truck he faced west. The horses were trotting along. When I first saw it, the automobile was by Muravchick's saloon. John Steinert was going down the eastbound track. I did not hear any horn or warning from this automobile. It traveled about 20 miles an hour. It struck Johnny Steinert; the front part. It stopped under the 'L' station on the north side of Division street. It did not slow down before it hit John."

John Sachs, who kept a paper stand on the corner of West Division street and North Hermitage avenue, testified that he saw the motor truck going east on West Division street and that it "was running fast."

Witnesses who testified for the defendant, including the driver of the motor truck, stated that at and before the time of the accident the motor truck was being driven at a speed of from

7 to 12 miles an hour. Several witnesses testified that the motor truck stopped at a distance of 100 or more feet east of the place where deceased was struck, and it is a fair argument that the truck must have been moving at a higher rate of speed than that testified to by defendant's witnesses, else the truck could and would have been stopped at a point nearer to the place where the accident happened. There does not seem to be any denial of the fact that the neighborhood where the accident occurred was closely built up and that school children were at the time traveling upon the street and sidewalks. If the testimony of certain of plaintiff's witnesses be true, that defendant's employe was driving the motor truck at a fast rate of speed, from 20 to 25 miles an hour, at a street intersection where numbers of children in returning from school were using the streets and sidewalks, then the jury were warranted in finding the defendant guilty of negligence.

The trial court did not err in refusing to direct a verdict for defendant on the theory that the deceased was guilty of contributory negligence as a matter of law. Deceased was a boy between 10 and 11 years of age, in good health and, so far as the evidence shows, of ordinary intelligence; he had a legal right to use the public streets in any manner compatible with the exercise on his part, in view of his age and of all the attending circumstances, of due care and caution for his own safety. Evidence in the record tends to show that he was struck at a point nearly opposite the southeast corner of Hermitage avenue and West Division street, that is, at or very close to the east cross-walk of Division street. There is a sharp conflict in the evidence as to just where the automobile was at the moment deceased got off the wagon. There is evidence which tends to show

that the motor truck driver had an unobstructed opportunity to see the boys as they left the wagon in sufficient time to prevent the accident which occurred. When this evidence is considered in connection with that of the high rate of speed at which witnesses testified the motor truck was moving, the age of deceased and all the other facts and circumstances of the case, we cannot say that deceased was guilty of contributory negligence as a matter of law. Whether he was or was not guilty of negligence was a question which was properly submitted by the trial Judge to the jury. Here we have the case of the participants in the collision moving toward each other at nearly right angles on a public street in a crowded neighborhood, one, a mature man operating a high-powered and dangerous vehicle; the other a ten year old boy proceeding across the street on his way from school to his home. There is a conflict in the evidence as to the manner in which the vehicle was being operated before deceased was struck. The case presents facts which were peculiarly proper for the consideration of the jury, which under the law was alone empowered to decide whether either of the persons directly involved in the accident was guilty of negligence.

In deciding the case of Hackett v. Chicago City Railway Company, 235 Ill. 116, the Supreme Court said:

> "Here several hundred school children, many of them but six years of age, had just been freed from the restraints of the school room. Any man of ordinary intelligence knows that children are then more apt to run and play in heedless glee than under ordinary circumstances, and that while so doing they will pay less attention to their immediate surroundings, and exercise less discretion, than they commonly do. The appellant was chargeable with this knowledge, and that being true, it was for the jury to say whether it was guilty of negligence in propelling the car at the rate of speed at which it traveled, and in failing, by its motorman, to have the brake-chain so wound up as that the brake could be instantly applied if necessity for stopping the car or lessening its speed arose."

We think the language of the above opinion is

strikingly applicable to the present case. In determining the question of whether deceased was in the exercise of proper care for his own safety, it was the duty of the jury to take into consideration the fact of his age and experience, together with all other factors in the case. Illinois Iron and Metal Co. v. Weber, 196 Ill. 526.

It may well be that deceased was momentarily confused by the approach of the automobile and the hallooing of persons from the sidewalk. One fact in the case seems, however, certain, and that is that any man of ordinary intelligence would expect a boy, under similar circumstances, to act just as deceased did act at the time of the accident, and a proper regard for human safety would have impressed the driver of the motor truck with knowledge of the likelihood of the happening of an accident such as did occur unless he kept his car under proper control. Stack, Admr. v. The East St. Louis & Suburban Railway Co., 245 Ill. 308.

It is said that the court erred in overruling defendant's motion in arrest of judgment, for the reason, as asserted, that the declaration fails to allege facts from which an inference may be drawn that the action was brought within one year from the date of the death of plaintiff's intestate. There is no merit in this point. The declaration alleged that the accident happened on the 8th day of May, 1917, and by examination of the record which will be made for the purpose of affirming the judgment, it appears that the suit was begun on the first day of November, 1917. It was the duty of the trial court to take judicial notice of its own records, from which it appears that the suit was begun in apt time. The statute upon which the defendant relies does make the bringing of the action within one

year a condition precedent to the maintenance of the action. The declaration in the present case does show that the action was brought within the year prescribed by the statute. The cases of Nellie Carlin, Admr. v. The Peerless Gas Light Co., 283 Ill. 142; Hartray, Admr. v. Chicago Rys. Co., 210 Ill. App. 382, and Goldstein, Admr. v. Chicago City Ry. Co., 286 Ill. 297, do not sustain the contention of the defendant. Not in any of these cases, from the declarations or by facts in the records of which the courts could take judicial notice, did it appear that the suits had been begun within a year.

A first and main contention of defendant is that the trial court erred in excluding from the evidence a portion of a verdict of a coroner's jury. Counsel have favored us with an elaborate brief touching a question which is definitely set at rest by the decision of the Supreme court in the case of Spiegel's House Furnishing Co. v. Industrial Commission of Illinois, 288 Ill. 422. In deciding that case the court said:

> "For almost thirty years, as already indicated, this court has held that the verdict of the coroner's jury was admissible either for the plaintiff or the defendant in a civil suit for the purpose of showing prima facie some fact or facts found by the jury and appearing on the face of the inquest, when the proofs of such fact or facts is material to some issue in the civil suit.
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> * * * * * * * * *
>
> "The court is of the opinion that it should be no longer the policy of this state and the holding of this court that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charged or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants of the nature indicated in the cases just reviewed. Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are as to such holdings, expressly overruled."

The trial court committed no error, except as against the plaintiff, in this particular.

The judgment of the Superior court is affirmed.

AFFIRMED.

105 - 25358

WIGNALL-MOORE COMPANY,
a corporation,
Defendant in Error,

vs.

ERIE RAILROAD COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF
COOK COUNTY.

216 I.A. 643

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant seeks by this writ of error to reverse a judgment entered in the Superior court of Cook County in favor of plaintiff for $1112.89.

The declaration filed by plaintiff in the cause alleged in substance that the defendant through carelessness and negligence had failed to safely and securely carry and deliver to plaintiff 392 barrels of grapes which had been delivered to defendant at New York City on December 12, 1914, for transportation to Chicago, Illinois, and that defendant did not carry the grapes to Chicago within a reasonable time.

Subsequent to the filing of the original declaration an amended declaration was filed, in which it was alleged that on December 12, 1914, the E. L. Hasler Company delivered to defendant 392 barrels of grapes to be safely and securely carried by defendant from New York City to Chicago; that the E. L. Hasler Company on June 1, 1916, had assigned all of its right, title and interest in the alleged cause of action to Wignall-Moore Company, the plaintiff. The amended declaration in other particulars is substantially the same as the original declaration.

A general and special demurrer filed to the amended declaration was overruled. The defendant filed a plea of the general issue and also a plea denying the assignment to plaintiff.

On the trial it was stipulated by the parties that the grapes were delivered to defendant at New York and that a bill of lading was issued by defendant by its agent at Long Dock, N. J., dated December 12, 1914, which showed receipt by defendant of 392 barrels of imported grapes which had been taken from the cargo of S. S. Brittania.

Evidence introduced on the trial tends to prove that the grapes were shipped from Spain on the Steamship Brittania, but it does not appear when they arrived at Long Dock, N. J., or New York City, nor does the evidence disclose what, if any, care was exercised for the protection of the grapes after they were unloaded from the steamship and before they were delivered to the defendant for transportation to Chicago; nor was it shown what the temperature was at any time prior to the arrival of the goods at Chicago.

Albert Peterson, testifying for plaintiff, said that he was superintendent for the Railway Terminal and Warehouse Company; that the grapes in question were received and examined by him at Chicago; that he found some of the grapes frosted; that he examined ten broken kegs; that the "heads were broken in and grapes exposed. Don't remember whether staves were broken, but heads were, at least, and grapes were exposed and kegs had to be recoopered;" that at the time he made the examination the grapes were in a warehouse; that the witness remembered that it was zero weather when the car which contained the grapes was received at the warehouse. From the testimony of this and other witnesses there is substantial evidence tending to prove that the grapes were in a deteriorated condition at the time they were received at a warehouse in Chicago.

The suit was brought under the Carmack Amendment to

the Interstate Commerce Act. While it is alleged in the declaration that the grapes were delayed en route, it is apparent from an examination of the testimony that plaintiff sought to render the initial carrier liable on the theory that the goods were frozen during transit from New York City to Chicago. The record contains no evidence aside from the recitals of the bill of lading as to the condition of the goods when they were received by the defendant for transportation to Chicago. The bill of lading acknowledged receipt of the grapes "in apparent good order, except as noted (contents and condition of contents of packages unknown.)" It is asserted by plaintiff that this recital in the bill of lading has repeatedly been held to amount to prima facie proof of the good condition of the commodity when received by the carrier. We are to determine, then, on the record before us whether the recital in the bill of lading that the goods were received "in apparent good order, except as noted," etc., does as a matter of law establish prima facie proof of the good condition of the grapes at the time they were received by defendant, notwithstanding the fact that the bill of lading recites that the contents and the condition of the contents of the packages which contained the grapes were unknown to it.

There are several decided cases which hold that where goods are delivered in good condition to a carrier for transportation and are thereafter delivered to a consignee in a deteriorated state, these facts constitute a prima facie right of recovery against the carrier.

The cases of Owen v. N. C. Ry. Co., No. 24407 Illinois Appellate Court, First District (not yet reported); Southern Ry. Co. v. Pettit, 257 Fed. 663, and Gallagher v. G. T. W. Ry. Co., 207 Ill. App. 316, are relied upon by plaintiff. These cases when examined, notwithstanding certain expressions therein, will

not be found to support the contention of plaintiff. In none of them was it held that a recital in a bill of lading such as that under consideration was in and of itself sufficient to establish prima facie proof of the good condition of the goods received by the carrier.

In its opinion in the Pettit case supra the court said:

> "Not only did the bill of lading acknowledge the receipt of the shipment 'in apparent good order, * * * which said company agrees to carry to its usual place of delivery at said destination,' but plaintiff had given affirmative oral testimony tending to show, not only that the cotton was in good shipping condition when received by the carrier, and free from fire, but that it had been so free for more than five days before."

The question under consideration here was not decided in the Owen case. It was held in that case that where any doubt arose as to the proper meaning or construction of the language used in a bill of lading, the language used should be construed more strongly against the carrier "because its officers or agent prepared the instrument." While certain language in the opinion in the Gallagher case seems to support the position of plaintiff, that case is not, on its facts, an authority in its favor.

In the case of Chicago & Alton R. R. Co. v. Benjamin, 63 Ill. 283, it was held that a carrier's receipt for goods "in apparent good order" did not relieve a consignor from proof of their condition at the time of their delivery to the carrier; and in the case of Gulf Coast & S. F. Ry. Co. v. Holder, 30 S. W. 383, the Court of Civil Appeals of Texas said:

> "The words, 'in apparent good order,' in the bill of lading refer only to the external, apparent condition of the goods, and such words create no contract with reference to the condition of the contents of the packages, bales, boxes, etc."

In the latter, as in the instant case, no proof was made as to the condition of the property when delivered to the initial carrier, nor that the damage resulted after its delivery

for transportation. As stated above, the record before us is barren of any proof with respect to the condition of the grapes from the time they were shipped at Spain for transportation to New York City, until they arrived at Chicago.

Clearly, it would be unreasonable and unjust to hold the initial carrier liable for such deterioration, if any, as existed in the goods at the time of their shipment at Spain or which might have occurred during transit to New York City, and it is equally clear that no sound reason can be offered in support of the contention that a recital in a bill of lading such as that above referred to is in and of itself sufficient to charge the initial carrier with knowledge of the actual condition of the goods, notwithstanding an express affirmation in the bill that the carrier had no such knowledge. As stated in the Holder case supra, the rule has no application where the goods are "shipped in boxes, packages, etc.;" and they are not subject to inspection by the carrier.

In American and English Encyc. of Law, (2nd ed.) vol. 5, p. 353, it is said:

> "The rule as to the burden of proof in an action against a carrier for loss or injury to goods is that the plaintiff is first bound to show affirmatively a receipt of the goods, in good order, by the carrier. There is no presumption that the goods were in good order when received by the carrier."

Leonard Seed Co. v. C. C. C. & St. L. Ry. Co., 162 Ill. App. 190.

In Jean, Garrison & Co. v. Flagg, 90 N. Y. Supp. 289, it was held that:

> "The bill of lading given by carrier to shipper recites that the goods, when received at East St. Louis by the carrier, were 'in apparent good order, except as noted, contents and condition of contents of packages unknown.' This was no more than a statement that the packages apparently were in good order, and, when taken in connection with the express disavowal of any knowledge of the contents or condition, cannot be held to mean more than that the external appearance of the packages when shipped was good. It would be unreasonable to hold that an acknowledgment of the good condition of the mer-

chandise was to be presumed from the mere delivery of a bill of lading containing such expressions."

The burden rested upon the plaintiff to prove his case by a preponderance of the evidence. It was therefore incumbent upon it to prove the good condition of the grapes at the time the initial carrier received them at New York City. In this the plaintiff failed. It relies solely upon the recitals of the bill of lading, and, as stated, it is our opinion that no reasonable inference can be drawn therefrom that the defendant knew, or that it intended to assume knowledge of the condition of the goods which were enclosed in barrels or kegs. While this question does not seem to have been definitely determined by the courts of review of this State, the cases above referred to and others to which our attention has been directed by counsel for defendant indicate that the trend of authority is opposed to the contention of the plaintiff.

In view of what has been said it will not be necessary for us to determine other questions presented in briefs of counsel. The defendant introduced no evidence on the trial and at the close of the plaintiff's case the court, at the request of plaintiff, instructed the jury to find the issues for plaintiff. In this the court erred, as the plaintiff had failed to offer sufficient evidence to establish that the grapes were in good condition at the time they were received by the initial carrier for transportation to Chicago. However, there is some evidence introduced which tends to prove a damaged and broken condition of the barrels or kegs in which the grapes were enclosed at the time they were delivered at Chicago, and that the temperature was well below the freezing point at this time. Whether the alleged frozen condition of the grapes resulted from these facts was a question which should have been submitted by the trial Judge to the jury.

The judgment of the Superior court will be reversed

and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

121 - 25375

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

SAMY BELFIORE, alias LUCIO MISSINA,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

216 I.A. 643

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Lucio Missina was arrested upon a warrant issued on a complaint filed in the Municipal court of Chicago on the 24th day of July, 1919. This complaint authorized the arrest of Samy Belfiore, "alias Lucio Missina," for falsely pretending that a certain bank check was a good and valid check. The warrant or capias which was issued upon this complaint authorized the arrest of Samy Belfiore to answer to the charge of "drawing checks with intent to defraud," etc. The judgment of the court was to the effect that "Samy Belfiore, alias Lucio Missina, is guilty of the criminal offense of drawing checks with intent to defraud," and the defendant was sentenced to the House of Correction for 30 days and to pay a fine of $250 and costs of the suit.

The evidence shows that the true name of the defendant is Lucio Missina and that he, for some years before his arrest, had been engaged in the flour business at 1818 Milton avenue, Chicago; that Samy Belfiore, the person named in the complaint and warrant, is not the defendant but is a person who was employed by him; that Belfiore left the employment of defendant on July 7, 1919, at which time he had passed a number of worthless checks signed by himself.

Leo Parker, an officer of the Acme Milling Company, testified that he was well acquainted with Missina, the defendant, and also with Belfiore; that Belfiore on the last mentioned

date delivered a check to the witness drawn on the Central Trust Company of Illinois, which was returned to the witness unpaid for the reason that "Belfiore had no money in the bank to pay it;" that Belfiore had purchased $230 worth of flour of the Acme Milling Company, in payment for which the worthless check was given.

Ed Novak, a witness, testified that the defendant presented to him a check for $77 in payment for groceries; that the bank refused to pay the check "because it was no good." This is the check for passing which the prosecution was begun against the defendant.

A cashier for the Novak Company testified that she was "pretty sure" that the defendant was the man who she saw sign the check.

Defendant testified that his name was Lucio Missina; that the officer who served the warrant arrested him as Sammy Belfiore; that Belfiore had passed a number of bad checks on July 7, 1917, and that he had left the defendant, taking with him $400, the property of defendant, which he, Belfiore, had collected. Defendant identified the signature of Samy Belfiore on the check which was received by the Novak Company, and denied that he ever had anything to do with it. "I never saw it and never had it in my hands. I never was in Novak's store in my life. I never bought any goods in Novak's store in my life."

While there is a direct contradiction in the testimony, we think the evidence offered on behalf of the defendant was so convincing in character as to warrant a reversal of the judgment.

It is undisputed that the defendant for some years had been doing business in Chicago and that he had an account with the Central Trust Company, in which bank Belfiore also kept an account; that the bank had closed Belfiore's account for

the reason that "he had issued so many bad checks against it."

H. J. Grimm, an officer of the Acme Milling Company, testified that the check delivered to that company by Belfiore, and upon which payment was refused by the Central Trust Company, was filled in by one of the men employed in the office of the Acme Milling Company and that it was there signed by Balfiore.

There seems to be no dispute in the record that Balfiore was dishonest; that he had passed worthless checks on several persons for considerable amounts and that among his victims was the defendant, who appears to have been, so far as the evidence shows, a reputable business man. It is shown by the evidence that Belfiore had defrauded other persons than the Novak Company on the very day that he had delivered to that company the worthless check and that all of the bad checks were in precisely the same handwriting. In view of the positive testimony of Mr. Grimm we are inclined to believe that the witness for the prosecution who stated that she was "pretty sure" that she saw the defendant sign the check upon which the prosecution was based, was mistaken, and that the witnesses for the prosecution had in good faith, no doubt, confused defendant's identity with that of Belfiore, his employe. In any event, the warrant authorized the arrest of Balfiore and the trial court had no jurisdiction on this warrant to enter judgment against the defendant.

The judgment of the Municipal court will therefore be reversed.

REVERSED.

128 - 25382

CHRIST KAIRATH,
Appellee,

vs.

NORTH AMERICAN BREWING COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 643

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant seeks by this appeal to reverse a judgment entered against it in the Municipal court of Chicago and in favor of plaintiff for $115.55. The case was tried by the court without a jury.

For the defendant it is insisted that the judgment should be reversed for the reasons, as urged, that the plaintiff failed to prove his case by a preponderance of the evidence and that the plaintiff could not recover for work done in violation of specific instructions.

It appears from a statement of facts in the abstract of record that the plaintiff had performed wagon repair work for the defendant for several months prior to December 4, 1917; that prior to this date a driver employed by defendant delivered a wagon belonging to it to plaintiff for certain repair work, which was performed by plaintiff. Plaintiff testified that he knew the driver who brought the wagon to him; that he afterwards saw the wagon several times on the public streets loaded with beer; that it was plaintiff's custom to render to defendant monthly statements for work and material furnished it, and that the defendant had never made any complaint as to the work or material or charges therefor until after the completion of the work on the wagon in question on December 4, 1917; that plaintiff on December 6, 1917, received

payment on a bill rendered to defendant for the November account, which did not include the claim sued upon; that on the latter date he was directed to do no further work for the defendant except upon written order; that after the work on the wagon was completed defendant sent one of its drivers for the wagon and that it was delivered to him and taken to defendant's brewery.

The president of defendant testified that he received the bill for the work performed on the wagon on January 1, 1918; that on December 6, 1917, he told plaintiff to do no further work on behalf of defendant until he, plaintiff, received a written order therefor.

The evidence shows that the plaintiff's claim was for work which the plaintiff says was performed prior to December 4, 1917. The evidence offered on behalf of defendant is to the effect that the direction to the plaintiff to do no further work for defendant except upon written order was given on December 6, 1917, two days after the completion of the work which the defendant now asserts was unauthorized. While it is true that the evidence shows that the bill for the work in question was not rendered until January 1, 1918, this fact in no way tends to contradict what seems to be a proven fact in the case, that the work on the wagon was completed before the defendant gave notice to the plaintiff not to perform further work for it except on written order.

A witness for defendant testified that he took the wagon to plaintiff's shop; that he saw "a man in the shop;" that he told him to fix the top of the wagon, "but not until he shall receive an order from the brewery." The evidence does not show that the directions given by this witness to "a man in the shop" were communicated to the plaintiff, nor that plaintiff had any knowledge of any change in the usual methods

of doing work for and transacting business with the defendant prior to December 6, 1917.

It is our opinion that the findings of the trial Judge were correct and the judgment will, therefore, be affirmed.

AFFIRMED.

140 - 25394

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

FRANK NIKITAS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

210 I.A. 643

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On August 23, 1919, an information was filed in the Municipal court of Chicago charging the defendant, Frank Nikitas, with unlawfully receiving two sacks of wheat of the value of $5 which had been stolen from Chicago Junction Railroad Company, "well knowing the same to have been unlawfully stolen." The trial court after hearing the testimony of witnesses found the defendant guilty. In the judgment of the court it is recited "that said Frank Nikitas is guilty of the criminal offense of receiving stolen property knowing the same to have been stolen. * * *" Defendant was thereupon sentenced to the House of Correction for three months and to pay a fine of $50 and costs of the suit.

It is asserted for the defendant that in a prosecution for receiving stolen property it is essential that the court or jury, as the case may be, shall find the value of the property stolen in the findings upon which the judgment is based. This contention is so clearly correct that no citation of authority is really needed in its support.

In the case of People v. O'Dowd, 211 Ill. App. 402, this court said:

> "Whenever the measure or kind of punishment is dependent upon the value of what has been taken, the court or jury, as the case may be, must find that value as part of the verdict or finding; otherwise the conviction cannot be sustained. A finding of guilty 'in manner and form as charged in the information,' is not sufficient to satisfy the requirements of the statute."

See Thompson et al. v. People, 125 Ill. 256; People of the State of Illinois v. Ellison, 185 Ill. App. 287.

The case was tried in the Municipal court without a jury, and neither in the findings of the court nor in the judgment entered thereon was any finding made as to the value of the property which it was alleged the defendant had received. The judgment of the Municipal court must, therefore, be reversed and the cause remanded.

REVERSED AND REMANDED.

117 - 25371

RUBY BENSABOTT,
Plaintiff in Error,

vs.

CHICAGO ARENA COMPANY,
a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

216 I.A. 644

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action on the case for damages for injuries suffered by plaintiff through the alleged negligence of defendant while she, the plaintiff, was in the skating rink of defendant.

The declaration is embraced within one count, and inter alia avers that plaintiff entered defendant's rink after paying the stated fee, and while in the exercise of due care and caution was skating in said rink; that the duty of defendant was to use all care and caution for her protection; that nevertheless defendant in this regard neglected its duty by negligently, and in violation of its own rules, while such rules were being observed by plaintiff, permitting certain persons negligently, wilfully and with lack of sufficient care on the part of defendant's servants, to trip and knock over plaintiff; and she avers that by defendant's negligence and improper conduct defendant permitted plaintiff, while in the exercise of all due care and caution, to be knocked down and that through such carelessness and negligence plaintiff was thrown on the ice of the rink and sustained a broken leg to her damage, etc.

While the cause went to trial before a jury, by agreement of the parties the jury was withdrawn and the trial proceeded before the court. After hearing all of the proffered

testimony the court decided that plaintiff had failed to make a case entitling her to recover, and entered a finding for defendant and a judgment of nil capiat. Plaintiff being dissatisfied with the judgment of the trial court brings the record here for review by writ of error.

Plaintiff's narration of the occurrence is about as follows: That on January 24, 1916, she and her brother, having paid the admittance fee, were skating around defendant's rink; that two women were standing on the ice; that as plaintiff and her brother went to circle around them the two women turned and tripped the brother and one of the women fell and kicked plaintiff; that the force of the kick lifted her bodily, she weighing 130 pounds; that she came down with such force that she suffered a broken leg and was taken to the Michael Reese hospital. Plaintiff further testified that she was told by persons in authority of the manner in which she must conduct herself while skating, and had been told to keep skating or to keep off the ice; that she had been with a party when one of them stood on the ice and the guard asked him to skate or get off the ice. When plaintiff was injured she was on the ice. She had seen guards ask persons to keep moving, and ordinarily the guards asked persons to keep moving when they were standing on that part of the ice where the accident to her occurred.

Plaintiff offered to prove that one of the officials of the defendant told her after the accident and while she was waiting for the doctor to come, that defendant would take care of her, but on objection this proof was not heard. Plaintiff had been skating about an hour and a half before the accident happened. During that time she was on and off the ice; she would skate and then rest and then return to skate. She was a good skater and her

brother was an accomplished skater. When she first saw the women with whom they collided they were standing still. She saw them start towards her and her brother and at that time they bumped against her brother. It also appeared from the evidence that the Arena was brilliantly lighted and that there were twelve guards and instructors on the ice all the time. The surface of the ice was without obstruction. There was a space in the middle marked off by two concentric lines painted in the ice. These lines were about two feet apart and inside these lines was a place 40 X 150 feet for fancy skating. Between these lines persons on skates were permitted to stand and watch the fancy skating. Outside these lines was an oval space extending to the seats on the sides of the rink, to the glass partition on the north and to a canvas wall on the south; in this outer oval the plain skating was done, a stream of skaters all moving in one direction.

It appears that the two women who caused the accident were seen by a guard to start from the space between the concentric lines just before the accident happened. When the guard saw the women start across the current of skaters he was about 25 feet away and he immediately started for them but before he could reach them the accident happened.

Plaintiff grounds her right to recovery on the claimed negligence of defendant in not having sufficient guards who were not engaged in giving skating lessons to take care of the crowd of about two thousand skaters, and that of the 12 guards employed at that particular time 10 were giving instructions in skating to patrons. However, be this as it may, such was not the proximate cause of the accident, as it clearly appears that the two women whose conduct precipitated the casualty were immediately observed by a guard to be proceeding in

violation of the rules when only 25 feet away and within almost momentary reach of the guard, who immediately started toward them with the evident purpose of stopping them from further violating the rules, but arrived too late at the spot where the accident occurred to prevent the collision and the resulting injury to plaintiff.

From these facts it cannot fairly be said that the accident was in any way attributable to a lack of guards in the vicinity of the place where the accident occurred. In that large concourse of people, with all the 12 guards skating with patrons, few of them could be as near as 25 feet to any particular set of skaters. To hold that defendant was liable for the actions of the two women, who were proceeding in violation of defendant's rules, would be tantamount to holding that defendant guaranteed the safety of every patron of its rink and was an insurer against the acts of every other patron whether willful or otherwise.

The accident was not occasioned by any faulty construction of the rink or the maintenance of any obstacle which was calculated to trip a patron, and in this regard the case is clearly distinguishable from all the cases cited in plaintiff's brief.

In Stickel v. Riverview Park, 250 Ill. 452, the "Katzenjammer" case, the plaintiff sought to leave otherwise than by a chute, which was the only exit provided by the defendant; an attendant forced her to leave by the usual route and in so doing her leg was broken. All the court there held was that such act did not establish negligence per se; nor, on the other hand, did it establish as matter of law that it was not negligence. In the "Katzenjammer" case the attendant forced the plaintiff to [illegible] her exit in a certain way, which resulted disastrously; but [illegible], to no act or omission of duty of defendant can the cause of

the accident to plaintiff be traced.

In Schofield v. Wood, 49 N. E. 636, a rail was not strong enough to hold plaintiff and she was injured by reason of its giving away; the court held that defendant could not escape liability, if he was negligent in the manner charged, on the ground that other persons may have contributed to the injury. In the case at bar there was no defect of any sort, either actual or constructive.

In Sharpless v. Pantages, 172 Pac. 384, the negligence consisted in defendant maintaining strips of carpet in a balcony aisle so that plaintiff was tripped and injured by reason of the fact that the carpet was loose; the negligence there being the maintaining of a carpet loosely laid which tripped a patron to his injury.

In Cook v. Piper, 79 Ill. App. 291, the accident was caused by the falling of a cake of ice from the rear end of defendant's wagon; it was held that it was negligence for defendant not to put some guard on the wagon to protect persons upon the streets from injury by the falling from the wagon of cakes of ice, which when unguarded might naturally be expected.

The other cases cited are as readily distinguishable from the instant case.

While it is true, as stated in Schultz v. Ericsson Co., 264 Ill. 156, that the proximate cause of an injury is ordinarily a question of fact for the jury to determine from a consideration of the attending facts and circumstances, yet in this case the trial being by the court, the facts and the law were for the court to determine, and we will assume that the court in the conclusion at which it arrived was of the opinion that reasonable minds could not differ as to defendant not being guilty of the negligence charged against it as the proximate cause of plaintiff's

injury; at least we are of such opinion.

As the accident is not attributable to any negligence charged or proven against defendant, but solely to the negligent conduct of the two women skaters who collided with plaintiff and her brother, we see no reason for disturbing the judgment of the Superior court and it is therefore affirmed.

AFFIRMED.

124 - 25378

MORRIS LANDE and ELI LANDE,
Appellees,

vs.

MORRIS WOLF, HARRY WOLF and CHARLEY WOLF,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

216 I.A. 644

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal, for the reason, as we suspect, that the controversy has ended and the questions at issue have thereby become moot.

The bill sought to enjoin defendants from carrying on business in competition with complainants at 7417 Madison street, Forest Park, in Cook County.

It appears that defendants Morris and Harry Wolf prior to April, 1917, carried on business at 7343-45 Madison street, Forest Park, and that Charley Wolf was associated with them; that Harry and Charley enlisted one in the army and the other in the navy of this country during the late world war.

The bill alleges that Morris and Harry Wolf were operating a drygoods store at 7343-45 Madison street, Forest Park, under the name of "Wolf Brothers," and that the defendant Charley Wolf, their brother, was associated with them in their business in the capacity of manager of salesmen; that Morris and Harry Wolf were owners of the real estate in which the drygoods business was located, as well as of a certain other piece of real estate numbered 7417 Madison street, Forest Park, which was located within two blocks of the first described premises; that they are still such owners; that on June 5, 1918, complainants purchased from Harry and Morris Wolf the drygoods business and

good will thereof at the premises above described, paying $15,000 therefor, and at the same time took a bill of sale therefor and a lease for the premises where the business was carried on, commencing the first day of June, 1918, and ending on the 30th day of April, 1923, at a rental therein reserved; that the good will of said business is of great value; that in the bill of sale, signed by Morris Wolf for himself and as the attorney in fact of Harry Wolf, there was contained the following condition:

> "IT IS EXPRESSLY AGREED AND UNDERSTOOD THAT as an additional consideration for said transfer the said Morris Wolf and Harry Wolf agree and undertake not to be interested in the same line of business directly or indirectly in any way whatsoever within a radius of two (2) square miles from the present location. This restriction to be good during the term of a lease executed between the parties for a period of four years and eleven months from date with a five-year option. At the termination of the lease this clause is to become inoperative."

It was further alleged that Morris and Harry Wolf entered into a conspiracy with the defendant Charley Wolf to ruin the business of complainants and with that end in view were about to open a drygoods business in the premises 7417 Madison street; that said business was to be conducted under the name of "Wolf's Dry Goods Store;" that defendants Harry and Morris Wolf were either directly or indirectly interested therein, the name of Charley Wolf being used merely as a cloak or subterfuge for the purpose of avoiding the covenant contained in the bill of sale above quoted; and it is charged that said Morris and Harry Wolf would maintain and operate said drygoods business at 7417 Madison street, which is only one block from the premises where complainants operate the drygoods business which they bought from said two last named defendants, unless restrained by an injunction from so doing; that unless the defendants are restrained by an injunction from carrying out their said conspiracy complainants' business will be largely reduced and partially destroyed; that such damages

cannot be estimated, and complainants'would sustain irreparable injury.

Defendants answered, denying all the charges of conspiracy alleged,and the cause was referred to a master to take proofs and report his finding of law and fact, which he did, recommending a decree against defendant Charley Wolf restraining him from being directly or indirectly interested in the same line of business conducted by complainants at the premises 7343-45 Madison street, Forest Park, or within a radius of two square miles of said premises during the period covered by the lease executed by Harry and Morris Wolf as lessors to complainants as lessees.

Each of the Wolfs testified that the business at 7417 Madison street was the business of the defendant Charley Wolf and that neither of them had any financial or other interest therein. The evidential facts which seem to have influenced the master and the chancellor in granting the decree were that Morris and Harry Wolf were Charley's landlords and that they had been seen aiding their brother Charley in arranging the store for the transaction of the drygoods business and that they were often seen around such store.

We think these surface appearances were insufficient to warrant an injunctional decree against the defendant Charley Wolf in the face of the testimony of all the defendants in denial and the documentary proof in evidence. The bill of sale was made by the defendants Morris and Harry Wolf. The restrictive covenant therein recited the making of the lease between the parties and provided that such restrictive covenant should continue during the term of the lease, at the termination of which the clause was to become inoperative.

The decree is illogical; it is against the defendant Charley Wolf only, who was not a party to the transaction between his brothers and the complainants. If, as contended, Morris and Harry Wolf were carrying on business in competition with complainants by the subterfuge of using the name of their brother Charley, and the business was in fact their business, and not Charley Wolf's, then they might have been enjoined from carrying on such business in that way and by such means.

Contracts in restriction of trade are to be strictly construed. Talcott v. Brackett, 5 Ill. App. 60. As Charley Wolf was not a party in fact or by interpretation to the restrictive covenant in the bill of sale, he is not in any manner bound by it.

We are at a loss to understand why Morris and Harry Wolf join in this appeal, as they are in no way or manner affected by the decree.

A case very similar to the one at bar is Hubbard v. Miller, 27 Mich. 14, where it was held that a sale and agreement made by a firm of two persons, one of whom afterwards went into the business alone, and the other as a partner with a third person who is made a defendant, limited the injunction as to such third person to prevent him simply from engaging in the business as a partner with either of the other defendants, but did not restrain him individually. Emmert v. Richardson, 44 Pan. 206; Harkinson's Appeal, 78 Penn. 196.

So in this case, by analogy of reasoning, the utmost length to which a decree could proceed as against Charley Wolf would be to enjoin him from carrying on business in partnership with his brothers Morris and Harry if it were to appear that the business was so being carried on.

The decree of the Superior court is wrong and is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

131 - 25385

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
WILLIAM E. McGOVERN, Impleaded, etc.,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

216 I.A. 644

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

May 29, 1912, the defendant and one Elmer J. Daisey were indicted by a grand jury in Cook county for illegally voting in the 35th election precinct of the 21st ward of the City of Chicago at a general election of aldermen in said city. The indictment alleges that Daisey, without having a lawful right to vote in said precinct at said election, knowingly and fraudulently did so, having been aided, abetted and persuaded thereto in his unlawful act by the defendant, William McGovern.

At the trial the State nolle prossed the indictment as to Daisey and he was then put upon the stand as the State's only witness. His testimony substantially supported the indictment. He testified that he was a roomer at the Aetna hotel, kept by defendant McGovern, and that he was importuned by McGovern to register as a voter, notwithstanding the fact that he had not lived in the State one year, having come here from Akron, Ohio, in June, 1911; all of which he told McGovern, who replied in effect that it made no difference; that McGovern gave him on a card the names of those for whom he should vote, among them being the name of Maclay Hoyne. He testified that he did "go over" and vote but he did not say where he went to vote. He did not testify that he voted on April 2, 1912, in the 35th election precinct of the 21st ward

in the City of Chicago, or on any other day.

McGovern took the stand in his own behalf and categorically denied every material statement made by Daisey in his testimony. There was no attempt made to impeach McGovern's character for truth and veracity and his testimony therefore stood before the court as much entitled to credence as that of Daisey, the self-confessed accomplice. There was no other testimony, oral or documentary.

The law requires that evidence sufficient to convict of a criminal offense must be such as convinces the mind of guilt beyond a reasonable doubt. The denial by McGovern of the material matters testified to by Daisey, who stands discredited by his own testimony, he having confessed to having been guilty of committing an unlawful act in voting somewhere without being a qualified voter or having the legal right to do so, is sufficient to raise a reasonable doubt in the mind of the court as to McGovern's guilt. Furthermore, the proceeding was in many other respects informal.

For the errors indicated the judgment of the Criminal court is reversed and the cause remanded.

REVERSED AND REMANDED.

132 - 25386

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. WILLIAM E. McGOVERN, Impleaded, etc., Plaintiff in Error.	ERROR TO CRIMINAL COURT OF COOK COUNTY.

216 I.A. 644

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This case is similar to case general number 25385, opinion in which is coincidently filed with this. The difference between this and case supra is that here the indictment was for illegally voting on April 9, 1912, at a general primary election of the Democratic party to nominate candidates under an act entitled, "An Act to provide for the Holding of Primary Elections by Political Parties," etc., while in case supra, the indictment was for illegally voting at an aldermanic election on April 2, 1912.

There is no evidence in the record in this case that Daisey voted at the Democratic primary election April 9, 1912, but the evidence is that he voted at an aldermanic election on April 2, 1912.

There being no evidence in the record proving the commission of the crime charged in the indictment, the judgment of the Criminal court is reversed and the cause is remanded.

REVERSED AND REMANDED.

143 - 25397

JOSEPH J. O'CONNOR,
Appellee,

vs.

JOHN SCHATANUS,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

216 I.A. 644

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before court and jury plaintiff had judgment for $500, the amount of his claim, and defendant prosecutes this appeal, asking a reversal.

At the time when it is claimed the relation of attorney and client was established between the parties to this litigation plaintiff resided at L'Anse, Michigan, and was a practicing attorney and also Probate Judge of Baraga County, Michigan. January 5, 1918, defendant, a resident of a suburb in the vicinity of Chicago, was at L'Anse, Michigan, where his nephew, John Jackszo, was confined in jail charged with the crime of murder. On a telephone message from a court bailiff plaintiff went to the jail at L'Anse, where he was introduced to defendant by the bailiff. Defendant thereupon told plaintiff that he had come to see about the murder case, that he was the uncle of Jackszo and wanted to hire plaintiff to take care of Jackszo's case, showing plaintiff a letter from his banker. Plaintiff said he was busy but would see him later in the day. It seems that defendant was later taken sick and informed plaintiff that he wanted the trial of the case against his nephew continued. Plaintiff prepared affidavits for a continuance, one of which was signed by defendant, which were presented in court on

the motion for a continuance, at which time defendant was present. Plaintiff failed to procure a continuance to the next term but succeeded in having the trial postponed one week. After this defendant requested plaintiff to defend Jackszo and do all he could for him, saying he would send his Chicago lawyer, a Mr. Carpenter, (who is one of the lawyers on defendant's brief in this case) whom defendant said was a good lawyer, to help plaintiff. To this plaintiff indicated his assent. The trial took place and plaintiff and Mr. Carpenter defended Jackszo. Carpenter evidently knew defendant had retained plaintiff to defend Jackszo, as witness the following telegram sent to plaintiff in his firm name January 11, 1918:

> "When will Jackszo case be tried? Can you obtain a continuance? What will you charge for services? Is case prepared, witnesses investigated, etc.?"

To which on the same day plaintiff replied:

> "I have Jackszo case well prepared. Outlook favorable. Prefer to arrange fee in person with you or Schatanus. Is Carpenter coming? Cannot obtain continuance. Case will commence Monday morning sure. Answer."

Defendant under date of January 16, 1918, telegraphed plaintiff: "Wire my expense result of case. Was it postponed? Advise fully."

From the evidence there can be no doubt that plaintiff was employed by defendant to defend his nephew Jackszo against a charge of murder, and that the undertaking of defendant in this regard was an original undertaking and not made in behalf of Jackszo although for his interest. The testimony of defendant to the contrary is shifty, far from frank, and is in its essence unconvincing. Defendant refused to pay any fee to plaintiff and rested such refusal upon the following, contained in a letter of plaintiff to defendant:

"I hereby release you from any obligation to pay me any moneys as attorney for the defense of said respondent (meaning Jackszo) until we have agreed upon such terms as are satisfactory to both of us."

Plaintiff explains the foregoing in this way: Defendant hesitated to sign an affidavit for continuance and plaintiff thought he was afraid to do so; that defendant had given him a letter from his banker stating that he was a man of means; that defendant did not know plaintiff, was undoubtedly a man of foreign birth and was in a strange country; that he thought perhaps defendant might think that he, plaintiff, was trying to "put something over on him," because, as plaintiff said, "Many do;" that defendant might fear he was signing a note or a promise to pay, and plaintiff wanted to be honest with him and let him know that he did not want to bind him to any particular price.

It seems that defendant was expected to go to the trial, but for some unexplained reason best known to himself, he did not do so; therefore plaintiff had no opportunity to settle a fee with defendant; but plaintiff's employment was neither recalled nor cancelled. On the other hand, defendant sent Mr. Carpenter to assist plaintiff in the trial of the case.

Under these circumstances the relationship of attorney and client existed, and there being no agreement for a specific fee, plaintiff was entitled to recover under a quantum meruit for legal services rendered in the defense of defendant's nephew, Jackszo.

There is no evidence in this record from Jackszo or any one else that plaintiff was retained by Jackszo to defend him. The defendant was the sole witness proffered in defense, and in the light of all the evidence of both the parties, and the telegrams and writings in the record, we are convinced that the jury might properly find that plaintiff was in the defense of

Jackszo acting at the instance and employment of defendant; that defendant's undertaking was not to pay Jackszo's debt, but was an original undertaking and employment by defendant of plaintiff, and therefrom the law raises the obligation of defendant to pay whatever plaintiff's services were reasonably worth. Plaintiff proved without contradiction that his services were reasonably worth the amount of the verdict and judgment. Defendant cannot defeat plaintiff's right to receive compensation because he failed to give plaintiff an opportunity to agree with him upon a fee.

There is in this record no error warranting a reversal of the judgment of the County court and it is therefore affirmed.

AFFIRMED.

162 - 25416

GENEVIVE MAJERI,
Appellee,

vs.

CHICAGO FLAT JANITORS' UNION LOCAL 14332,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 645

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. As we have often said before we repeat - the abstract of the record is the pleading of the party who brings the cause for review to this court, and from it must appear sufficient to support, if well taken, the errors assigned on the record. While the court will go to the record for information which will aid the affirmance of a judgment, it will not search the record for matters absent from the abstract which might be sufficient to work the reversal of a judgment. The record before us is so scantily abstracted that it presents nothing for our review. We recite the following from the abstract of the statutory record: "Statement of Claim," "Summons," "Finding," "Judgment," "Motion for a new trial," "Motion in arrest of judgment," "Prayer for an appeal" to this court and allowance thereof.

These recitations disclose no information regarding the nature of the action, the state of the pleadings, or the amount of the judgment, which matters should be made to appear in an abstract of the statutory record. The fact that the amount of the judgment and the action of the court thereon in denying motions for a new trial and in arrest of judgment, are recited in the statement of facts lends no aid to the abstract of the statutory record. The judgment belongs in the record and not in the

bill of exceptions or statement of facts. Therefore, judicially we know nothing about the cause of action, its nature, state of the pleadings, amount of the judgment, or whether such judgment is predicated upon the finding of the court or the verdict of a jury. As said in Stohn v. Naughten, case general number 25180, in this court, opinion not yet reported:

> "It has frequently been held that the abstract is the pleading of the parties and must show the record of the trial court that the court of review may be so informed as to what took place as to be able to judge whether or not error was committed. ** Not being informed as to what the judgment of the trial court was, it will not be disturbed."

We also said in Barber v. Mellish, 209 Ill. App. 299:

> "We will not go to the record for information to reverse a judgment which the defendant should have furnished in the abstract. Salisbury v. Deutsch, 178 Ill. App. 633; Griggs v. Griggs, 204 ibid 160; Johnson v. Waldman, ibid 190; People v. Flannigan, ibid 548; DeLong v. Hruby, 203 ibid 206; People v. Shapiro, ibid 292; McGovern v. City of Chicago, 202 ibid 139."

The abstract is violative of rule 18 of this court, which provides that a party bringing a cause to this court shall furnish a complete abstract or abridgement of the record. Where such abstract fails to so materially conform to this rule as not to present for our review the errors assigned, the judgment appealed from will be affirmed.

We do not, however, discover from an examination of the record that there is any error either of law or procedure which would justify a reversal of the judgment did the abstract sufficiently conform to rule 18 to present the matters assigned for error to us for review.

For the foregoing reasons the judgment of the Municipal court is affirmed.

AFFIRMED.

198 - 25453

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

FRANK McERLANE and OTTO CHRISTENSEN,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

216 I.A. 645

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendants were convicted with others under an indictment for a conspiracy to effect a jail delivery from the Cook County jail on September 12, 1918. No question arising as to the sufficiency of the indictment it will not be further noticed in this opinion. Upon a trial by jury all the defendants were found guilty and, we assume, although not judicially informed of the fact, were sentenced to some punishment. The plaintiffs in error are the only defendants convicted who are seeking a review of the record in this court.

The proofs show that on September 12, 1918, a most daring and successful jail delivery was effected from the Cook County jail of some of the most hardened and desperate criminals that could well be gathered together in one jail. Two of those who escaped were under sentence of death for murder and have since expiated their crimes upon the gallows, being recaptured; another was convicted of robbery with a deadly weapon, and defendant Frank McErlane was charged with an assault with intent to kill.

It is argued for reversal that there is a reasonable doubt of the defendants' guilt; that where there is conflicting evidence the jury must be adequately instructed and the record must be free from material and substantial error; that the trial

Judge erroneously abridged the cross-examination of one Miller, an accomplice, and made remarks prejudicial to defendants; that the sentence should have been an indeterminate one under the parole law of 1917 and that the sentence violates the State constitution, which provides that the penalty shall be in proportion to the nature of the offense.

In the condition of the abstract the record is not presented to this court for review. As this court and the Supreme court have often said, the abstract is the pleading of the parties and the court will not go to the record in search of material for a reversal of the judgment. There must appear from the abstract itself matter sufficient to support the errors, or some of them, assigned upon the record; lacking these elements an affirmance pro forma will follow.

In no part of the abstract before us, neither in the common law record nor in the bill of exceptions, is the judgment made to appear. Its proper place is in the abstract of the common law record. Notwithstanding this fact, we will briefly review the merits of the cause and the errors assigned.

It is true that the major portion of the testimony regarding the forming of the conspiracy was that of the accomplice Miller; but every detail of its execution was substantiated by the testimony of other witnesses and by subsequent occurrences in the line of the conspiracy entered into. Christensen was to saw the bars and when they were sawed, Kempter, a deputy jailer and one of the conspirators indicted, was to unlock the doors under the pretense of taking a man from one cell to another so that he might cover up any connection with the escape. The bars were sawed and the saw that was used was brought into the jail by Christensen. Miller communicated a conversation he had with Christensen to another defendant, Joe Moran. Christensen told Miller that the

lock on the window had already been sawed and soaped. Kempter, the assistant jailer, was bribed, and arrangements had also been made by Joe Sullivan, another defendant, for an automobile to carry away the escaped prisoners after the broke out of the jail. As a part of the conspiracy it was arranged that the defendant McErlane was to call Kempter, who was on watch that night, and that Kempter was to take McErlane from his cell and put him in Moran's cell, which was done at about 6:30. According to a prearrangement, after Kempter returned from supper the prisoners began to "holler" at each other, and Miller called out, "Here is a letter, John. Joe wants to see you down there." At that time Miller was in the cell with one John Faith. Miller saw Kempter unlock McErlane's cell door and saw McErlane step out of his cell and put an arm on Moran, who took the keys and handed them to McErlane. They went past Miller's cell and McErlane unlocked the cell of 415 and Kempter walked in and closed the door. After that Bopp and Dear came out of their cells with their hats and coats on and in a few minutes the automobile arrived and the jail breakers got into it and were driven away.

We are convinced that the evidence of the State was abundantly sufficient to establish the conspiracy charged beyond a reasonable doubt and that such evidence supports the verdict. The defendants' witnesses were mostly inmates of the penitentiary at Joliet at the time they gave their testimony. Their evidence was in its main features contradictory of Miller's story. However, it was the province of the jury to sift and weigh the evidence and to determine which was credible, and we assume that the jury arrived at the conclusion after weighing all the evidence, as do we, that the story of Miller was in all its essential particulars substantiated by all the facts and circumstances attendant upon the jail delivery. Under these circumstances we should not

feel like disturbing the jury's verdict or holding that the evidence as a whole raises a reasonable doubt of the guilt of McFrland and Christensen of the conspiracy charged in the indictment.

While there may be technical defects in some of the instructions complained about, still we are of the opinion that, all the instructions considered, the jury were fairly instructed as to the law of the case as applied to the facts in evidence, and that no material right of either of the defendants before us was invaded or jeopardized by the giving of any of the instructions complained about. The court will not reverse a judgment because of a faulty instruction where it is apparent that the same did not prejudice defendants or affect the result of the trial. People v. Cleminson, 250 Ill. 135; Hitzman v. People, 110 ibid 362.

We do not discover any erroneous rulings of the court on the admission or exclusion of evidence or in the limitation of the cross-examination of the witness Miller.

We find nothing prejudicial in the remarks of the court complained about. Defendants were indicted for conspiracy, and it is contended that they should have been sentenced under the parole act. Whether or not they were so sentenced we are not informed by the abstract. However, it has been held that the crime of conspiracy does not come within the parole act of 1917. People v. Moses, 288 Ill. 281; People v. Bond, case general number 24493, opinion filed in this court June 23, 1919, not yet published, and affirmed by the Supreme court at the December term 1919 in an opinion not yet published.

It is also urged that the punishment inflicted is violative of the State constitution. Even were this so, this court has no jurisdiction to pass upon constitutional questions. However, it

would be our opinion that the punishment was not unconstitutionally severe.

No reviewable error appearing justifying a reversal, the judgment of the Criminal court is affirmed.

AFFIRMED.

218 - 25474

PEOPLE OF THE STATE OF ILLINOIS ex rel. KATE SMOLINSKA, Appellee,

vs.

STANLEY RENKOWSKI, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 645

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted, on the verdict of a jury and judgment thereon, of being the putative father of relatrix' female bastard child; he brings the record here for review by appeal.

There is an absolute absence of any evidence that defendant at any time or place had sexual relations with the relatrix. The relatrix gave no testimony. Although placed upon the witness stand, no testimony could be extracted from her of an articulate character. It is said she is a deaf mute, although through a Polish interpreter she gave utterance to a few unintelligible monosylables. No attempt was made to test her ability to understand the mute sign language, through which she might have been interrogated, nor was it sought to discover whether she could write.

A sister testified that when defendant was confronted with relatrix' pregnant condition he said he "couldn't help it;" while upon the witness stand defendant denied not only having made any such statement, but that he ever had any sexual relations with relatrix at any time or place. The sister seems from her testimony to have been bent on placing the burden of paternity somewhere and chose defendant as the victim.

This is altogether too grave a charge to permit a judgment of conviction to be sustained without any substantial proof to support it.

For the failure of evidence to support the conviction, the judgment of the Municipal court is reversed and the cause is remanded to the trial court for a new trial.

REVERSED AND REMANDED.

227 - 25484

F. S. McLAUGHLIN, doing business as Northern Wood Fuel Company,
Appellee,

vs.

S. MARCINKIEWICZ, doing business as S. & M. Coal Company,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 645

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant operated two coal and wood yards in Chicago, one located at 1828 West Forty-third street and the other at 639 West Thirty-ninth street. Wood to the value of $578.39 was delivered by plaintiff to defendant's Thirty-ninth street yard during the months of April, July, August and September, 1917.

On a trial before the court there was a finding and judgment for the amount of the claim, and defendant is here with the record asking a reversal.

The defense rests in the claim that on February 26, 1917, defendant sold the yard where the wood was delivered and notified a salesman of plaintiff named Norton of that fact.

It appears without contradiction that defendant did business under the style of S. & M. Coal Company for reasons that are obvious to people of the English-speaking tongue. Defendant had a running account with plaintiff in the name of "S. & M. Coal Co." It is not only not denied but stands admitted that the sign "S. & M. Coal Co." remained on the Thirty-ninth street yard during all the months in which the wood, the cost of which is sued for in this suit, was being delivered. Norton denied having received any notice from defendant or

anybody else that defendant had sold the Thirty-ninth street yard, and the bookkeeper who kept the accounts testified that she had neither notice nor knowledge of any change of proprietors. In these circumstances the defense failed.

The judgment of the municipal court is affirmed.

AFFIRMED.

356 - 24708

JOHN S. ERICKSON, Admr. of the Estate of Charles Nelson, deceased,

Appellant,

vs.

MICHAEL HEDDY,

Appellee.

APPEAL FROM MUNICIPAL COURT, OF CHICAGO.

216 I.A. 645

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a tort action of the fourth class in the Municipal Court of Chicago, for the conversion of money alleged to have been collected by the defendant and which belonged to the plaintiff as administrator and which the defendant was alleged to have failed to turn over to the said plaintiff. The amount of money so alleged to have been converted was $152.00 less $24.75, which the defendant did turn over. The issues were submitted to a jury and by their verdict they found the defendant not guilty.

The defendant admitted, while testifying as a witness, that he had collected all the items going to make up the plaintiff's claim, and he admitted that these sums belonged to the estate of which the plaintiff was administrator. The defendant did not deny that he had promised the administrator to turn this money over, and he further admitted that he had never done so.

It appears from the evidence that the deceased had run a small livery and boarding business during his life time and that the defendant had kept a horse and cab there. It further appears that after the plaintiff took possession of the business as administrator of the estate, the defendant looked after the running of the business, buying feed when it was needed, having the harnesses mended and the horses shod and so on. Some time after he had made the collections belonging to the estate and the plaintiff had on several occasions demanded a settlement and a payment of the amount collected by the defendant, the latter made some claim for wages. The defendant finally told the plaintiff that if the plaintiff would not pay him anything for what he had done, he would not turn over the amount he had collected, and he (the plaintiff) could do what he liked about it. On cross-examination the defendant admitted that there had been no arrangement between him and the plaintiff, whereby he was to have any wages; that there had never been any arrangement by the parties whereby he was to do work for the plaintiff, and no conversations were had about the defendant running the business. The plaintiff further testified that at the conversation in which the defendant claimed he was entitled to some amount as wages, the plaintiff reminded him that he had permitted him to keep his horse and cab in the barn after he had taken possession of the business for the estate, without any charge and that later, when the business was purchased from the estate by the defendant, there was some hay and feed on the premises for which no charge was made.

In our opinion there is not sufficient evidence in the record to justify a verdict allowing the counter claim put in by the defendant and the judgment must be reversed and the cause remanded for a new trial. If the defendant rendered services for which he is entitled to be paid by the plaintiff as administrator it should be shown definitely what the services were.

Inasmuch as the defendant admitted that he had collected all the items going to make up the plaintiff's claim, and that these sums belonged to the estate of which the plaintiff was administrator and that he had never paid them over, as plaintiff alleged, the latter would be entitled to a judgment for the amount claimed less the amount of defendant's counter claim provided such counter claim is established by proper and sufficient evidence.

In any event however the plaintiff would not be entitled to a tort judgment against the defendant for a conversion. The livery business was sold by the estate and purchased by the defendant about the middle of May and the defendant suggested that instead of the administrator billing the customers who had horses in the stable, for the first half of the month and the defendant for the second half of the month, the defendant would bill them for the entire month and then pay the administrator the proportion of the collection, to which he was entitled. The administrator agreed to this and it was done and many, if not most, of the items going to make up his claim consist of the parts of these collections to which the estate was entitled. Under such circumstances conversion would not lie. Kerwin v. Balhatchett, 147 Ill. App. 561; Farrell v.

Bruce, 190 Ill. App. 309.

However, under the Municipal Court act, actions of this class are brought without formal written pleadings and the fact that the plaintiff's statement of claim is in tort would not prevent his recovery of a money judgment, provided the evidence warranted it. Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311.

For the reasons stated the judgment of the Municipal Court is reversed the the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

390 - 24743

ISABELLA BIRD,
Appellant,

vs.

CITY OF CHICAGO,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

216 I.A. 646

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment for the defendant, the court having instructed the jury to find the defendant not guilty at the close of the plaintiff's case.

By her action the plaintiff sought recovery of damages for alleged personal injuries. The only question presented by this appeal relates to the sufficiency of the notice of the alleged injuries. Under the statute, before such an action can be brought, the plaintiff must within six months from the date of the accident file in the office of the City Attorney and City Clerk, "a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician (if any)." Ill. Sts. J.& A. sec. 6190.

It was alleged in the declaration that the injury complained of occurred on September 12, 1915. It appeared in evidence that under date of September 20, 1915, the plaintiff's husband wrote a letter to the "Law Department of the City of Chicago", reading as follows: "I wish to inform you that on Sunday, September 12th, my wife received a serious injury to her leg by bumping against one of the iron boxes used by the city for street cleaning on Polk near Sherman street as the result of a narrow obstructed sidewalk: Yours sincerely, Adam A. Bird, 603 5th Ave."

Under date of September 24, 1915, a communication was sent from the office of the City Attorney addressed to Mr. Bird and reading as follows: "I beg to advise you that the iron boxes which are used for street sweepings are the property of the Citizens' Street Cleaning Association, located in the Old Colony Building at Dearborn and Van Buren streets. You ought to take up your claim with them. Very truly yours, Marshall Amberg, Assistant City Attorney."

The question here presented has frequently been before the courts of review in this state, the statute has been declared constitutional and valid and it has repeatedly been held that its terms must be strictly complied with by one suing a Municipality for personal injuries, and it is apparent that in a number of respects the notice involved here was not one which met the requirements of the statute. Guimette v. City of Chicago, 242 Ill. 501; Walters v. City of Ottawa, 240 Ill. 259; Swenson v. City of Aurora, 196 Ill. App. 83; Reichert v. City of Chicago, 169 Ill. App. 493; Zycinski v. City of Chicago, 163 Ill. App. 413.

It is urged by the plaintiff that the defendant having shown by the letter of its City Attorney in reply to the notice sent, that it had received that notice and having failed to request further information or raise the point that the notice received did not give the information required by the Statute, it should not subsequently be permitted to urge the insufficiency of the notice and thus defeat her action. The giving ofthe notice required by the statute has been made a condition precedent to the City's liability and constitutes an essential element of the plaintiff's cause of action. The City has no power to waive the giving of a proper notice and is under no liability until such a notice is given. Walters v. City of Ottawa, 240 Ill. 259.

We find no error in the record and, therefore, the judgment of the Circuit Court is affirmed.

AFFIRMED.

419 - 24772

GEORGE B. DYGERT, for the use of Mary L. Freeman, individually, and as Executrix under the last will and testament of Henry V. Freeman, Deceased, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
SHERMAN C. SPITZER, Appellee.	216 I.A. 646

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the plaintiff in a garnishment proceeding, from an order discharging the garnishee.

On February 7, 1918, the original plaintiff, Mary L. Freeman, individually and as executrix under the last will and testament of Henry V. Freeman, deceased, recovered a judgment in the Municipal Court of Chicago against George B. Dygert for $166.60 for rent. Execution was issued and returned no property found and thereafter this garnishment proceeding was instituted against the garnishee, Sherman C. Spitzer.

In support of this proceeding plaintiff showed that execution had been issued following judgment in another suit against the same defendant for another installment of rent under the same lease and that execution had been placed in the hands of the sheriff on December 10, 1917; that on December 14, 1917 the judgment debtor,

Dygert, had transferred to the garnishee, Spitzer, a certificate for certain shares of stock in the Copper Canyon Mining Company and that at that time Spitzer was acting as the attorney for Dygert and that on December 21, 1917, Spitzer had sold this stock for $5,209.19.

Spitzer testified that an indebtedness existed from Dygert to him which had been accumulating over a long period and had grown to somewhere between $3,000 and $3,500; that no part had ever been paid nor had he ever received any interest; and that he demanded payment of it or some security on it and that Dygert transferred the stock in question to him in consideration of his debt; that he found a man who held a considerable amount of the same stock and was willing to take more and he sold the stock to him for the consideration above mentioned and gave Dygert $720 in the way of a commission for bringing about the sale. The execution placed in the hands of the sheriff December 10, 1917, was returned no property found, March 8, 1918.

The garnishee, incontesting this proceeding, contended that the issue of whether he had in his possession or control any property or effects belonging to Dygert or in which the latter had any title or interest, had been previously litigated between him and the plaintiff and that such issue had been decided in favor of the garnishee and that the plaintiff was, therefore, estopped by such previous finding from again controverting the question.

It appears from the record that on December 31, 1917, a judgment was entered in another suit against the same defendant Dygert for another installment of rent under the same lease, the plaintiff in that case being "Mary L. Freeman, executrix of the estate of Henry V. Freeman, deceased"; that execution was issued on that judgment January 2, 1918 and returned no property found on January 3, 1918 and on the same day garnishment proceedings were begun against Spitzer by "Dygert for use of Mary L. Freeman, executrix of the estate of Henry V. Freeman, deceased."

It further appears that on January 4, 1918, a judgment was entered in still another suit against the same defendant Dygert for another installment of rent under the same lease, the plaintiff in that case being "Estate of Henry V. Freeman, by Mary L. Freeman, agent"; that execution was issued on that judgment January 5, 1918 and returned no property found on January 7, 1918 and on the same day garnishment proceedings were begun against Spitzer by "Dygert for use of the Estate of Henry V. Freeman, by Mary L. Freeman, agent."

Upon the hearings on these two previous garnishment proceedings the garnishee was discharged. It was stipulated by the parties in the suit at bar that the Mary L. Freeman, George B. Dygert and Sherman C. Spitzer named in these various suits are the parties who appear of record as parties to the present garnishment proceedings and appeal.

The two previous garnishment proceedings would be res judicata and by reason of thoseproceedings the plaintiff would be estopped from prosecuting the garnishment proceedings involved here, if the evidence showed that in those previous proceedings, or at least one of them, the plaintiff sought to recover from the garnishee by reason of the transfer of stock from Dygert to the garnishee and the sale of that stock by the latter, which is the matter the plaintiff is urging here as the basis for recovery. There is no such showing in this record. The most that appears is testimony by the defendant that the previous garnishment proceedings involved "the same issues" or "the same subject-matter" as the present suit. The issue or subject-matter involved in all the garnishment proceedings was whether the garnishee, at the time he was served, was possessed of any funds belonging to Dygert or whether at that time the garnishee was indebted to Dygert. We do not consider the evidence in this record sufficient to show that in either of the previous proceedings the plaintiff urged the affirmative of that issue because of the transfer of stock which is in question in this suit.

The plaintiff contends that she should recover against the garnishee here because of the fact that he took the mining stock in question from Dygert, on December 14, 1917, when it was subject to the lien of the judgment on which execution was placed in the hands of the sheriff on December 10, 1917, and that it continued to be subject to that lien at the time Spitzer sold it which was December 21, 1917. This contention cannot prevail. The execution

which was placed in the hands of the sheriff on December 10, 1917 was returned "no property found" on March 8, 1918, ninety days after it was issued. (Ill. Sts. ch.77, sec. 8) no levy having been made under it and whatever lien had attached to the stock in question at the time the execution was given to the sheriff, thereupon ceased to exist, Corbin v. Pearce, 81 Ill. 461; Lamutz v. Gross, 16 Ill. App. 329. The garnishee was not served in the case at bar until May 6, 1918.

However, we are of the opinion that the judgment in this case must be reversed and the cause remanded to the Municipal Court of Chicago for a new trial on another ground. The evidence is sufficient to show that at the time of this stock transfer between Dygert and Spitzer, the latter was acting as attorney forthe former in connection with the suits which had been brought against him for rent. That the defendant appeared in court on several occasions representing Dygert in connection with one or more of these suits for rent and that this was done at Dygert's request is not disputed. As was said by the court in Rogers v. Marshall, 3 McCrary's Reports (U.S. Cir.) 76, "Nothing more was necessary to constitute the relation of attorney and client". The transfer of stock being a conveyance of that property by Dygert to his attorney, the transaction is presumed by the law to be constructively fraudulent and, therefore, in a suit by Dygert, the client, or by a creditor through him, by which it is sought to set aside that transfer or recover its proceeds, the burden of proof is upon the defendant attorney, to show that the

transfer was bona fide and in no way fraudulent upon his client or the latter's creditors. This rule is applicable to contracts or transfers between a client and his attorney while that confidential relation exists and it is not confined to cases in which the particular property which was the subject of the contract or transfer, is the same property involved in the matter concerning which the attorney may have been employed. 3 Am. Eng. Ency. of Law, (2nd. Ed.) 337; Jennings v. McConnel, 17 Ill. 148. Quoted with approval in Ross v. Payson, 160 Ill. 349. 1 Story's Equity Jur. (14 Ed.) sec. 433. See 14 Cent. L. J. 168; Weeks on Attorneys at Law, sec. 273.

Presumably the judgment appealed from involved a finding by the trial court to the effect that the defendant had sustained the burden cast upon him by the law and shown by a preponderance of the evidence that the transfer of stock, from Dygert to him, was one which should be held valid, and in that respect we are of the opinion that the finding of the court was against the manifest weight of the evidence. Without discussing the evidence at length, it will be sufficient to say that the defendant did not testify that there was any definite sum owing from Dygert to him, but he did testify that he had advanced sums to Dygert from time to time over a long period and that these had come to aggregate somewhere between $3,000 and $3,500; that the indebtedness was not evidenced by any note or other writing but that the receipt of some sums advanced had been acknowledged in letters, and others in I.O.U. memorandums; that the defendant had demanded payment or some security from Dygert but that the latter had no funds with which to pay

the debt, but was willing to turn over about the only thing he had, which was the stock in question. The defendant further testified that Dygert did not transfer the stock to him to secure the debt but in payment of it and he says that when he received the stock from Dygert he returned to him such memorandums evidencing the indebtedness as he could find and that some he could not find as they were buried in old trunks, in the form of letters, and were not available. Although the indebtedness was as the defendant testifies, for something between $3,000 and $3,500 and interest, the defendant testified that when he took the stock in cancellation of that indebtedness, "I did not expect to realize anything on that stock. I didn't suppose it was worth anything. I simply took it as the best thing I could get." However, it appears from the evidence, that within a week after the defendant had taken the stock, not expecting to realize anything on it or supposing that it was worth anything, he sold it for over $5,200, an amount far in excess of the maximum figure testified to as theamount of the indebtedness, in payment of which the stock was transferred. And although the defendant testifies that Dygert transferred the stock to him in cancellation of the debt and that therefore he took the stock for better or for worse and could not be considered as owing Dygert anything if it turned out to be worth an amount which exceeded the amount of the debt, it nevertheless appears that the defendant did pay Dygert $720 out of the sum realized from the sale of the stock. He says this payment was in the way of a commission to Dygert for bringing about the sale.

From all this evidence we are of the opinion that at the time the defendant was served with the garnishee summons in this case he must be held to have owed Dygert at least a sum sufficient to warrant a judgment against him in favor of this plaintiff and on a re-trial of this case such judgment should be entered unless the defendant submits further evidence which will be sufficient to meet the burden which the law casts upon him of clearly establishing the bona fides of the stock transfer, or unless sufficient evidence is produced as heretofore indicated to establish the contention that the previous garnishment proceedings are res judicata.

For the reasons stated the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

194 - 24542

CONTINENTAL TRUST & SAVINGS BANK, a corporation, Trustee in bankruptcy of ISAAC HIRSCHBERG and HARRY H. HIRSCHBERG, co-partners,

Appellee,

vs.

JOSEPH C. SCHWARTZ, LOUIS SCHWARTZ and RUBY SCHWARTZ, co-partners, trading as SCHWARTZ BROTHERS,

Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

216 I.A. 646

216 I.A. 646

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, as Trustee of I. Hirschberg & Son, a co-partnership, bankrupts, brought this suit against defendants to recover the value of certain goods sold by the bankrupts to the defendants with intent to defraud, cheat, and injure the bankrupts' creditors, alleging that defendants had knowledge of this fact. The action was based on Secs. 67-E and 70-E of the Bankruptcy Act. There was a verdict and judgment in plaintiff's favor for $12,105, to reverse which defendants prosecute this appeal.

The record discloses that the bankrupts, prior to the time they were adjudicated such, were manufacturers of cloaks, suits and skirts, and were conducting their business in Chicago; that the defendants were engaged in buying and selling job lots and odds and ends of woolens, trimmings, silks, and clothing; that in March, 1907, four months before

the petition in bankruptcy was filed against the bankrupts, they sent out a financial statement to persons from whom they were seeking credit, showing assets of more than $20,000 and liabilities of $3240; that after this statement was made and prior to the bankruptcy proceeding, the bankrupts purchased nearly $9,000 worth of goods on credit; that at the time of the failure their debts exceeded $18,000, while their assets were worth only $3207.11; that from June 22, 1907, until July 17, 1907, the Hirschbergs sold to the defendants, as it was received, more than eight thousand yards of woolens for thirty-five per cent less than they had contracted to pay for it; that for the sale of these goods the defendants paid the bankrupts $6202.62; that on July 20, 1907, a petition in bankruptcy was filed against the Hirschbergs and on August 5 they were adjudicated bankrupts; that afterwards plaintiff was appointed Trustee and claims aggregating $18,391.50 were filed and allowed in the bankruptcy proceedings; that the assets of the bankrupts were appraised at $3207.11; that the Trustee recovered certain moneys on account of fraudulent payments made by the bankrupts, so that the total assets in the hands of the Trustee amounted to $3616.53.

It was the theory of the plaintiffs that the bankrupts and defendants had entered into a fraudulent scheme whereby the bankrupts were to purchase goods on credit and resell them to the defendants for much less than the bankrupts had contracted to pay for them, and that this was afterwards carried out. On the other hand, the defendants' position was that the purchase of goods by them from the bankrupts was bona fide, and that they

had no notice or knowledge that the bankrupts were in financial difficulties at the time of the purchases, or that the bankrupts were intending to defraud their creditors. The defendants' position on this issue is that the verdict is against the manifest weight of the evidence, and the result of passion, prejudice, and sympathy. We do not think it necessary to discuss the evidence on this point in detail. The witness, Gurewitz, testified for the plaintiff that up to the time the petition in bankruptcy was filed he was a bookkeeper for the bankrupts; that in June or July, 1907, Ruby Schwartz, one of the defendants was in the bankrupts' place of business; that the witness overheard a conversation between Schwartz, Hirschberg, Berman and Schallman, in which it was stated that Schwartz would purchase all the merchandise Hirschberg could get at 35% off the cost price; that Hirschberg gave Schwartz an original invoice for goods on which Schwartz figured up the amount that defendants would be required to pay the bankrupts for that particular bill of goods. This conversation was denied by Schwartz and Schallman - Berman did not testify. They both testified that they had not been to the bankrupts' place of business together. Schwartz denied being there at any time. The defendants also produced three apparently disinterested witnesses who represented three different tailoring concerns. Each testified in substance that they had sold at different times to defendants, woolens for considerably less than the purchase price, sometimes from 30% to 50% less. They testified, however, that the woolens so sold were odds and ends, old stock, and whole pieces

that were sold at the end of the season, which were not desirable to carry over. If this were all the evidence on this point, there might be some basis for defendants' argument. But there is no dispute that the defendants purchased between June 22 and July 17, 1907, eight thousand yards of woolens from the bankrupts for 35% less than the bankrupts had agreed to pay for them, and the goods so purchased were not odds and ends nor old stock, but were new goods and the sales were not made at the end of the season. We think it clear without a further analysis of the evidence that the entire transaction was a crooked, fraudulent scheme from beginning to end, and that any disinterested person, who would consider the evidence, could come to no other conclusion.

But defendants contend that the judgment cannot stand for the reason that plaintiffs failed to allege and prove that the individual members of the bankrupt firm were insolvent; that the only reason the trustee can maintain this suit is for the purpose of collecting sufficient assets to pay the creditors, and that in the bankruptcy proceedings only the partnership was adjudicated bankrupt and not the individual members and, therefore for aught that appears, the individual members of the bankrupt partnership may have sufficient assets to pay all the creditors. In support of this the case of Rodolf v. First National Bank of Tulsa, 23 Am. B.R. 397, is cited. Whatever may be held in that case, it is not law in Illinois for in the case of Abbot v. Anderson, 265 Ill. 285, it was held that the theory that a partnership was a legal entity distinct and separate from the members

composing it, was not the law in this State, and that where an involuntary proceeding in bankruptcy is brought against a partnership there can be no adjudication against the partnership unless all of its members are insolvent.

It is next contended that the court erred in permitting plaintiff to amend by changing the name from American Trust & Savings Bank, Trustee of the bankrupts, to the Continental & Commercial Trust & Savings Bank, as such trustee; that the amendment afterwards made was not in accordance with the order of court in that it reads "Continental Trust & Savings Bank" instead of "Continental & Commercial Trust and Savings Bank", and therefore, there was a variance. On the trial, in proving the amount of money received by the trustee, it developed that the American Trust & Savings Bank had changedits name to the Continental & Commercial Trust & Savings Bank, and the amendment was accordingly allowed. We think the fact that the amendment was not in technical compliance with the order, cannot be availed of. The question of variance was not in any way raised on the trial.

It is insisted that the court committed error in admitting over objection evidence offered by the plaintiff, which was highly prejudicial to defendants. The evidence complained of is (1) a certified copy of the claims filed and allowed against the bankrupts, (2) the inventory and appraisement of the bankrupts, and in permitting one of the bankrupts to refresh his recollection from the bankruptcy schedule, (3) the transcript of the

testimony given by Ruby Schwartz, one of the defendants, before the Referee in Bankruptcy on an examination in that proceeding in an endeavor to discover assets of the bankrupts, (4) the Trustee in Bankruptcy's books of account, (5) the financial statement made by the bankrupts about four months prior to the bankruptcy proceedings for the purpose of obtaining credit, (6) the books of account of the bankrupts and the testimony as to certain payments made by them, (7) the testimony of Henry H. Kennedy, and the cross-examination of Ruby Schwartz and Michael Gesas, and admitting the summons in another case in evidence, and (8) the testimony in rebuttal of Chas. S. Briot and Kate Holmes. We think all of the evidence tending to show what was done in the bankruptcy proceeding was properly admitted, as these records conclusively showed the assets and liabilities of the bankrupts. Of course, what was there done could not bind the defendants in any way, but before the plaintiff could recover in this case it was necessary for him to prove that the bankrupts sold the goods in question to the defendants to hinder, delay and defraud the bankrupts' creditors, and all of this evidence tended to prove this fact. For the same reason the financial statement made by the bankrupts; their books of account and the testimony of Henry H. Kennedy, wereproperly admitted. Nor do we think there was any error in the cross-examination of the witness Gesas.

During the cross-examination of Schallman several impeaching questions were asked him as to whether he had testified before Referee Eastman in the bankruptcy proceed-

ings. On the trial of the instant case his answers to questions put to him were evasive to say the least, and a witness testified that his reputation for truth and veracity was bad, and that he would not believe him under oath. Briot had taken a great deal of the testimony in the bankruptcy proceedings. He was called to prove what Schallman had there testified to but, when called, he testified that this part of the testimony given before the Referee was taken not by himself but by another court reporter. He was put on in rebuttal to show why he could not produce such testimony of Schallman. This was perfectly proper, for if he had not been called in rebuttal, counsel for defendant might make much of this in his argument to the jury. The witness Holmes was called in rebuttal and testified that she had taken the testimony of the defendant, Louis Schwartz, who was a member of the defendants firm, when he appeared as a witness in the Fass Brothers bankruptcy matter, Ruby Schwartz having testified, in the instant case, that he did not remember such a case, and that he was not then a member of the defendant firm. The testimony of the witness Holmes was entirely proper. We are of the opinion, however, that there was error in permitting the introduction of the transcript of the evidence given by Ruby Schwartz and the summons in the Fass Brothers matter. In the Hirschberg bankruptcy proceedings Ruby Schwartz, one of the defendants, was examined in an endeavor to discover assets of the bankrupts. His testimony was taken down in shorthand and afterwards transcribed. It consisted of 112 or 113 typewritten pages. The court

reporter who took this testimony testified that it was a correct transcript of the testimony given by Schwartz, and while the witness was rather hesitant in some particulars in this regard, we think it was sufficiently shown that the transcript was correct. But we do believe that all of this was proper evidence in the instant case. Counsel for plaintiff contends that it was properly admitted for the reason that it was an admission against the defendants tending to show that the goods in question were not purchased by the defendants in good faith and for a fair consideration. This was the argument and before the trial court and is here made, and in addition it is said the transcript was admissible in evidence as a part of the res gestae, not only against the witness Ruby Schwartz himself, but also against the other defendants. This examination of Schwartz was had in July, 1907, a few days after the bankruptcy proceedings were instituted. We think it was not so closely connected in point of time as to constitute part of the res gestae, nor do we think it was necessary to read the entire 112 or 115 pages to prove any admission he there made. This could have been done by reading certain questions and answers from that examination. A great deal of this transcript tended to show that the purchase of the goods by the defendants from the bankrupts was thoroughly crooked. We think this transcript was not admissible in its entirety. In the instant case it appeared without dispute that Schallman acted as an agent or broker between the bankrupts and defendants in the purchase and sale of the goods in question, and on cross-examination of Ruby

Schwartz he was asked if he was not aware that it was a common practice of merchants in Chicago engaged in the same line of business as the bankrupts, to purchase merchandise on credit for the purpose of defrauding creditors. He replied that he might have heard of such a thing, but that he had not personally come in contact with such merchants. He was then asked if Schwartz Brothers had not been sued in such a case in 1907 by the trustee of the firm of Fass Brothers, bankrupts. The witness replied that at that time he was not a member of the firm of Schwartz Brothers, and that he did not remember about the Fass Brothers matter. In rebuttal, plaintiff offered in evidence a summons issued by the clerk of the Superior Court of Cook County against Schwartz Brothers in the suit of the Trustee of the estate of Fass Brothers, bankrupts, and that the return showed that the summons had been served on the witness as one of the defendants. But even if we assume that there was error in the admission of this evidence, yet that would not warrant a reversal of the judgment. It is clear that the transaction between the bankrupts and the defendants was so thoroughly crooked that it is in no wise apparent how a different result might be expected at another trial. In this state of the record the judgment should not be reversed for the error in the admission of the testimony mentioned, Knight v. Seney, 290 Ill. 11. Where it appears that a jury, on competent evidence and under proper instructions, cannot reasonably reach any other conclusion, then the verdict and the judgment on the verdict ought not to be

reversed, so that a better record might be made on the trial. People v. Halpin, 276 Ill. 363.

Complaint is also made of the ruling of the court in refusing to permit the witness Gesas to give the entire conversation with Charles S. Briot. Briot testified that the transcript of the testimony taken by him in the bankruptcy proceedings was correct, and on cross-examination he was asked certain impeaching questions as to what he said in a conversation with Gesas. Thereupon the defendant called Gesas as a witness and endeavored to have him narrate the entire conversation. This, of course, was improper. The witness could only be examined concerning the impeaching questions. In such circumstances, the entire conversation cannot be called for by the impeaching party. Manchester Fire Assurance Co. v. Insurance Co., 91 Ill. App. 600.

It is also contended that counsel for plaintiff made improper and prejudicial remarks in the presence and hearing of the jury. One of the bankrupts was called as a witness and testified that shortly before the bankruptcy proceedings, he paid his sister-in-law $2500, which he had borrowed from her; that he paid this about two months before the failure, and that he borrowed it about six weeks before the time he repaid it. After some argument by counsel as to other questions put to the witness, counsel for plaintiff said that it was their theory of the case that the repayment was fraudulent. The court said he had that theory in mind. We think that there was nothing in the remarks of counsel that was improper.

Objection is made to the giving of instructions. It is said they would lead the jury to believe that if they found from the greater weight of the evidence, fraud on the part of the bankrupts only, it would be sufficient to warrant a verdict against the defendants. Of course, the defendants would not be liable if they acted in good faith, but the instructions complained of were not subject to the objection made. In five instructions the court told the jury that proof of fraud on the part of the bankrupts would not justify a verdict against the defendants, but before they could find for the plaintiff they must believe from a preponderance of the evidence that the purchases made by defendants from the bankrupts were not made in good faith and for a fair consideration. It is said that the instruction on the question of damages was wrong in that it fails to tell the jury that credit should be given defendants for the amount which they paid the bankrupts forthe goods. This is wrong. Defendants were not entitled to receive such credit or deduction, Blake, Trustee v. Thwing, 185 Ill. App. 187. It is also said that the instruction concerning the present fair consideration or value of the goods was wrong in that it was not based on any evidence. That there was no evidence of the fair and reasonable market value, other than that which showed the amount paid by defendants to the bankrupts.

The evidence tends to show that the woolens sold were new piece woolens and were delivered to the defendants as they were received; that original invoices were delivered to the defendants who agreed to deduct 35% from such invoices and that such deductions were actually made. A witness on

behalf of plaintiff also testified that the fair cash market value of the woolens at the time was as indicated by the invoices. While the testimony of this witness on this point is unsatisfactory, we think the evidence was sufficient (there is none to the contrary) to warrant the instruction given.

It is also argued that the court erred in not giving an instruction offered by defendants. That instruction told the jury, as a matter of law, even if they believed from the evidence that the bankrupts at the time of the sale of the goods to the defendants, intended to defraud their creditors, yet if they further believed from the evidence that the defendants had no notice or knowledge of such intention and purchased the goods for a present fair consideration in good faith, then plaintiff could not recover. The court modified the instruction by adding after the words "good faith" "as defined in these instructions." We think the modification was clearly proper as other instructions given told the jury what they must find under the evidence to constitute good faith on the part of the defendants.

It is said that the court erred in refusing to instruct the jury on behalf of the defendants that where one offers a witness, he thereby represents him as worthy of belief. The plaintiff called Schallman as a witness and afterwards introduced evidence that he was unworthy of belief. No complaint is made that it was error to receive this testimony and it being in the record and submitted to the jury for their consideration, the instruction was, of course, improper. But in any event was no

error. Schallman was called as a witness for plaintiff to identify the handwriting on the invoices of the property which defendants purchased. There is no dispute about his testimony in this regard. He was then called as a witness for the defendant. They went into the whole transaction seeking to show that it was bona fide. The plaintiff then called a witness who testified that he would not believe Schallman under oath. We think no one who would read the testimony of Schallman would give any credence to anything he said. The instruction was entirely misleading because other witnesses both for the plaintiff and defendants testified to facts that went to the transaction different from the testimony of Schallman. It is competent for a party to impeach his own witness by calling other witnesses to testify to a different set of facts which are at variance with the testimony given. Chicago Rys. Co. v. Gregory, 221 Ill. 591.

Plaintiff submitted five special interrogatories, three of which the court gave. The defendant submitted eight which were refused. The three given and the answers made were in substance, (1) Did the bankrupts sell the property in question with intent to defraud their creditors? Ans. Yes. (2) Did the defendants purchase that property for a present fair consideration? Ans. No. (3) Did the defendants purchase the same in good faith? Ans. No. We think these interrogatories were entirely proper. Some of the interrogatories tendered by the defendants were covered by those given. It would serve no useful purpose to discuss the other refused interrogatories, for they would in no way affect the result in this case.

It is finally argued that the verdict is excessive in that the only evidence as to the value of the goods sold was given by the witness Gurewitz. We have heretofore commented on the testimony of this witness in this regard, and find that there was no denial that the goods were purchased for 35% less than the bankrupts had agreed to pay for them. This was at least some evidence of the value of the goods, and it is uncontradicted. In these circumstances it cannot be said that the verdict is excessive.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

271 - 24622

JAMES F. BISHOP, Administrator of the Estate of Edward Jacob Mackenroth, Deceased, Appellant,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
vs.	
CHICAGO & WESTERN INDIANA RAILROAD COMPANY, a corporation and THE CITY OF CHICAGO, a corporation, Appellees.	216 I.A. 346

MR. JUSTICE O'CONNOR delivered the opinion of the court.

James F. Bishop, as administrator of the estate of Edward Jacob Mackenroth, deceased, brought suit against the Chicago & Western Indiana Railroad Company and the City of Chicago to recover damages for the wrongful death of the deceased. Suit was commenced August 27, 1915, and a declaration of one count filed the same day, in which it was alleged deceased came to his death on or about March 31, 1915. Plaintiff, by leave of court, on December 19, 1917, filed an amended declaration consisting of four counts. To the amended declaration the City of Chicago filed two pleas, first the general issue and second the Statute of Limitations, viz: that the suit was not commenced within one year after the death of the deceased. The Railroad Company filed a general and special demurrer. The plaintiff filed a similiter to the general issue and a replication to the plea of the Statute of Limitations. The city of Chicago demurred to the replication.

The demurrers filed by the two defendants were sustained and the suit dismissed at plaintiff's costs, to reverse which plaintiff prosecutes this appeal.

The court, in sustaining the demurrer of the City to the replication to the plea of the Statute of Limitations, held in effect that the plea was good and the action barred, and since the City had also filed a plea of general issue which had not been withdrawn, it must be admitted on this appeal that the amended declaration set up a cause of action. In such case, demurrer, even upon motion, could not be carried back to the declaration. Wear v. Jacksonville & S. R. R. Co., 24 Ill. 594; Wilson v. Myrick, 26 Ill. 135; Supreme Lodge K. of P. v. McLennan, 171 Ill. 417. In fact there is no contention made by the City that the original declaration did not set up a cause of action, nor that the amended declaration did not set up a cause of action, nor is there any argument made that the amended declaration set up a different cause of action from that alleged in the original declaration. The brief filed on behalf of the city makes three points, two of which are general statements of legal propositions, and no application or attempted application of them is made to the instant case. The third point which is made and argued is not in the case at all for the reason that it was not urged anywhere in the record nor in the brief filed by the plaintiff. It, therefore, appears that the so-called brief filed on behalf of the city is useless for it does not assist or attempt to assist us in any way. It is of no assistance to a court to lay down general

legal propositions unless it is pointed out how they apply to the particular case. General legal propositions are well understood, but the difficulty is in applying them to a particular case. We must then consider the case against the city on plaintiff's brief and argument and what we find in the record.

So far as the city is concerned the only question for us to pass upon in this appeal is whether the amended declaration set up a different cause of action from that stated in the original declaration. Since there were four counts in the amended declaration to which the plea of the Statute of Limitations was held a bar, if it appears that this was wrong as to one count, the ruling of the court was wrong. The original declaration, so far as it is material to be noted here, set up that on or about March 31, 1915, the Railroad Company owned and maintained several railroad tracks crossing 69th street in Chicago; that the railroad over 69th street was supported by a structure resting upon embankments and was ten or twelve feet above the sidewalk and the roadway of the street; that 69th street runs east and west and the railroad tracks cross it at right angles; that under the structure supporting the railroad tracks near the south side of 69th street and attached thereto, was an electric feed wire carrying a heavy voltage of electricity owned and maintained by the City of Chicago; that the wire was not so insulated as to protect persons who might come in contact with it; that afterwards the railroad company erected a certain drip roof over the sidewalk at 69th

street and about two feet below the structure supporting the railroad tracks, so that the electric wire was above this drip roof; that the deceased, a boy about fifteen years of age, while in the exercise of due care and caution for his own safety, came in contact with this live wire and was killed. The only additional allegation in the first count of the amended declaration is that the City of Chicago knew of the erection of this drip roof by the railroad company and knew that by reason of the construction of such roof, the wire was accessible to anyone on the roof. In other words, this count of the amended declaration simply charged the city with notice that the wire was dangerous by reason of the roof. In these circumstances we think the amended declaration did not set up a different cause of action from that alleged in the original declaration. The original declaration, without this allegation of notice would have been sufficient after verdict. City of East Dubuque v. Burhyte, 173 Ill. 553; Lindquist v. Hodges, 248 Ill. 491. The most that can be said then is that the original declaration without this allegation of notice was but a defective statement of a good cause of action and, therefore, the running of the Statute of Limitations was arrested. It follows that the amended declaration did not set up a different cause of action and, the plea of the Statute of Limitations was bad.

The railroad company filed a general and special demurrer to each count of the amended declaration. Each count, so far as material, set up in substance that the railroad company owned and maintained a viaduct crossing

69th street; that under the viaduct and near the south end of it, attached to the lower side of the viaduct was an electric feed wire carrying a heavy voltage of electricity which was owned and maintained by the city; that the railroad company knew of the presence of the wire and that it carried a heavy current of electricity; that it was not insulated to protect people who came in contact with it; and that the railroad company erected under the south end of the viaduct at 69th street over the sidewalk a short distance below the viaduct, a drip roof "in such a way that said roof became accessible to persons and children * * * and thereby the said electric feed wire, which before that time was inaccessible to persons of ordinary height became and was accessible to persons passing upon said roof", and that it was the duty of the defendant to protect and enclose the roof so that it could not be entered upon by children or other persons, but that defendant neglected this duty, and carelessly permitted "the said roof to be and remain unenclosed and unprotected in such a way that it became accessible to whose who wished to enter upon it." A demurrer having been interposed to this declaration, the rules of pleading required that the declaration be construed most strongly against the plaintiff. It is clear that there is no allegation of fact in the amended declaration that in any way would indicate how the wire became accessible to persons after the construction of the roof. It is argued that this roof was eight or ten feet above the sidewalk, but how anyone could get upon the roof does not appear. It is alleged that the wire was accessible to persons entering upon the roof. This, of course, is

manifest, for there was only a foot or two between the roof and the wire, but we are in no way informed how the roof became accessible. The demurrer was properly sustained.

The judgment of the Circuit Court of Cook County, in so far as it sustained the demurrer of the railroad company and dismissed the suit at plaintiff's costs is affirmed. The judgment, in so far as it held the plea of the Statute of Limitations filed by the city good, and dismissed the suit at plaintiff's costs, is reversed and the cause remanded.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART AND REMANDED.

278 - 24629

CHARLES C. RENSHAW, Appellee, vs. F. NUNEMAKER, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

216 I.A. 646

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Charles C. Renshaw brought an action in the Circuit Court of Cook County against F. Nunemaker to recover damages for injury to his personal property located in a building owned by defendant, caused by escaping steam. There was a verdict and judgment in favor of plaintiff for $1059.50, to reverse which defendant prosecutes this appeal.

The record discloses that defendant was the owner of a forty-two apartment building in Chicago; that plaintiff was a tenant of one of the apartments; that the several apartments were heated by a steam heating plant which was under the exclusive control of the defendant; that on or about the 16th of July, 1913, one of the radiators in the four room apartment occupied by plaintiff was removed by defendant's janitor; that sometime about the latter part of September of the same year when the weather began to grow cold, the defendant, by his janitor, started up the heating

plant, the boilers of which were located in the basement; that plaintiff and his family at the time were not at home; that the steam from the heating plant escaped through an open pipe where the radiator had been removed and damaged plaintiff's household furniture in the apartment.

Plaintiff's evidence tends to show that in July he spoke to the janitor telling him that his wife desired a radiator in the apartment removed and requested him to go to the apartment and that his wife would show him just what she wanted done; that the janitor afterward went to the apartment and plaintiff's wife pointed out the radiators she desired removed; that in compliance with her request the janitor removed the radiator, using tools that he had for the purpose.

The janitor testified, on behalf of defendant, to the effect that plaintiff's wife requested the removal of the radiator; that he demurred, stating that it was against his instructions, but that she insisted it be removed and promised to pay him for the work; that he thereupon removed the radiator and that she then paid him twenty-five cents. Plaintiff's wife testified that she pointed out the radiator to the janitor and that the latter removed it and said nothing about it being against his instructions, and that she did not promise and did not pay him for the work. Since the jury found in favor of plaintiff, we must assume on this record that they found in favor of plaintiff's contention and against the defendants. Defendant

contends that since the radiator was removed by the janitor contrary to the instructions, and that in doing so he was hired and paid for the work by the plaintiff, he was acting as agent of plaintiff and not as the agent of the defendant. Under the written lease by virtue of which the premises were let to plaintiff, defendant was required to furnish steam heat. Defendant testified that under the general working rules of the building, if he was absent from Chicago, and a radiator should leak or a pipe burst, the janitor would make the necessary repairs if he was able to do so, or if not, he would call up the renting agents of the building and they would send someone to make the repairs. We think the work of removing the radiator, under the circumstances, was within the general duties of the janitor, and if there was any negligence in this regard, the defendant is liable. Since there was evidence tending to show that the janitor in removing the radiator did not close the valve of the pipe leading to it, and although denied by the janitor, the evidence in this regard was sufficient to warrant the jury in finding that the janitor failed to close the valve after removing the radiator, and we must assume that the jury so found. It is said, however, that the proximate cause of the damage to plaintiff's household effects was not the turning of steam into the open pipe, but that the removal of the radiator was the proximate cause, and that the charge of liability in the declaration was the turning on of the steam. We think this argument is unsound for it is clear that the turning on of steam under the circumstances was the proximate cause of the

damage done, McNichols v. Malcolm, 39 Can. Sup. Ct. 265; Seith v. Commonwealth Elec. Co., 241 Ill. 252.

Defendant also contends, as we understand it, that he is not liable for the reason that the written lease provided that he should not be liable "for any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, or sewerage, or the bursting, leaking or running of any cistern, tank", etc. We think this provision of the lease does not cover the question of escaping steam as shown by the evidence in this case, and in no event could it excuse the defendant from his own negligence.

It is further insisted that the written lease provided that no changes or alterations should be made in the premises without the written consent of the defendant, and that since there was no such written consent, the premises were altered or changed contrary to the lease and defendant is not liable. This contention is untenable. We think there was no alteration or change in the premises as contemplated in the lease and moreover as we have held that the janitor in removing the radiator was acting as agent of the defendant the point made is immaterial.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

277 - 24628

THOMAS BEAMISH and SIMON GORMAN, co-partners as BEAMISH & GORMAN, Appellees,	APPEAL FROM
vs.	CIRCUIT COURT, COOK COUNTY.
E. D. KIMBALL & CO., a corp., Appellant.	

216 I.A. 647

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiffs, Thomas Beamish and Simon Gorman, co-partners in the business of horseshoeing, claiming that the defendant, E. D. Kimball & Co., together with others, unlawfully combined and conspired to prevent them from buying horseshoers' supplies, brought an action on the case and recovered a verdict and judgment in the sum of $1,000.00. This appeal is therefrom.

Gorman and Beamish were horseshoers, in business at 406 Federal street, Chicago. They had been in the horseshoeing business together since March 27, 1913, at which time Beamish, the plaintiff, had bought out his father's interest and taken his place in the business. The plaintiffs were members of an organization known as the Cook County Horseshoers' Union. It was a comparatively new organization, having been incorporated on April 1, 1910. Beamish was financial secretary until September or October, 1913. There had existed in

Chicago from twenty-five to thirty years an organization known as the Master Horseshoers' Association. In June, 1913, that association had a membership of 498. There was also another similar, though even older, organization known as the Journeymen Horseshoers' Union. It had been in existence about fifty years. There was obvious rivalry between the last two and the new Cook County Horseshoers' Union, to which latter the complainants belonged. The evidence is voluminous; eight witnesses testified for the plaintiffs and twenty-five for the defendants. As the matters involved are chiefly of fact, it is impossible to give intelligible reasons for the decision of the cause, that is, such as may be understood, without setting forth, at least a resume of the evidence.

The evidence on behalf of the plaintiffs tends to show the following series of facts:- In the early part of September, 1913, Gorman, one of the plaintiffs had a conversation with one George Challacombe, Assistant General Manager of the defendant company, at the Briggs House in the presence of Beamish. The defendant was a dealer in horseshoers' supplies. At that conversation Challacombe said: "This is in a kind of a bad place that we are meeting, there is quite a number of horseshoe salesmen that stop here at the Briggs House and hang around here. I think we had better go some place else or we will be seen." Gorman said, "all right", and all three of them then went out into Fifth avenue and into a nearby saloon. In the conversation which took place there Challacombe said: "The Master Horse-

shoers have been after me so, now they are after me and they are calling us to a meeting of master horseshoers and hardware men which I am not going to attend. I am going to send Bruce Durham and he will act for E. D. Kimball & Company." When asked that the meeting was for, Challacombe said: "Why, for to stop selling the Cook County Horseshoers members materials, supplies, particularly yourself and Beamish." Gorman said: "That is pretty tough." "I have been born in the city of Chicago. * * * and they are going to try to stab me."

Subsequently Gorman met Durham, and the latter said: "You fellows will be up against it now." "Why don't you leave the Cook County Horseshoers' Union and go into the Master Horseshoers' Association and get this over with us. It is making it hard for all of us. The Master Horseshoers' Association and the hardware men had a meeting at which I represented E. D. Kimball & Company and they boycotted you. We can't sell you anything." "God, don't come near the place. We can't sell you anything."

On the first of October, 1913, Gorman met Durham again, this time at the store of E. D. Kimball & Company; Kimball, also, was present. Gorman and Beamish had been up on the second floor of the premises and placed an order with the clerk of E. D. Kimball & Company, the defendant, for some horseshoer supplies amounting to about $90.00. They gave him $100.00 in cash and the clerk took the order. After waiting four or five minutes he came back and said: "You are wanted down in the office." Accordingly, they went down to the office and Durham handed them their money back and said: "You know what I told you on Dearborn street. You can't buy anything here." "I am only assistant here. Mr. Challacombe is not here, he is the boss, you got to come

when he is here." They also spoke, on that occasion, to one Robinson, an officer of the Kimball Company, and told him they wanted to buy some material. They showed him that they had the money, but he told them he could not sell them anything.

In the course of the afternoon of the next day, the two plaintiffs and one Eddie Coleman, an officer of the Excavating Teamsters, one Shanhahan, President of Chicago Truck Drivers Union, one Morris, an officer of the Lime and Cement Teamsters' Union, one Miller, Business Agent of the Coal Teamsters' Union, and one Mike Hartray, Business Agent of the Machinery Movers' & Helpers' Union, went to the store of the defendant company. They saw Challacombe and Durham. Challacombe wrote down their names and then said: "I am up against it on this proposition." "I can't sell you anything." He further told them to come back the next day and he would give them an answer. They all called the next day. Gorman put some money down on Challacombe's desk and said to him: "I want to buy some material." Challacombe picked up the money and handed it back and said: "I don't want your business." Prior to that time the plaintiffs had bought goods of the defendant company.

On October 1, 1913, the plaintiffs and a man named Windle went to W. C. Newbury's, a dealer in horseshoer supplies, to buy some goods, but Newbury threw up his hands and said: "Boys, they are after me so strong that they are putting me out of business for selling Beamish and Gorman material," etc. "George Jaffray is picketing my place. God, it is driving me out of business." Gorman, you know I have been good to you all the time, for God's sake don't come here, for God's sake don't come to my place, they are driving me out of business. The Master Horseshoers' Association."

In October, 1913, Gorman went to McGuire's place, and told the man in charge he wanted to buy a couple of kegs of horseshoes. When the clerk learned whom they were for, he said: "I can't sell them to you." When asked why, he said: " - - - - - - - - You know why." Some time in the first part of October, 1913, the plaintiffs met McGuire and in the course of a conversation, McGuire told them that he would not sell them any material; that they were boycotted. He further said: "We had a meeting last month, the hardware men and the Master Horseshoers' Association and Joe Jaffray and Duffield and Bruce Durham and Draper of Draper and Snape was there and you are boycotted, we are going to put you out of business." Also, McGuire said he was at the meeting and that the plaintiffs would not get any material from any hardware house; that they were boycotted.

Some time later Gorman met one John H. Elder, an agent of McGuire, who said, when asked if he would sell the plaintiffs anything: " - - - I would like to sell you but you know I can't do it, you know all about it, it is all over town you know."

One Jaffray, formerly a horseshoer and a member of the Master Horseshoer's Association, tried to get Gorman to leave the Cook County Horseshoers' Union and join the Masters' Association, but Gorman told him that he did not want to double cross three or four hundred men. Jaffray then said: "If you will come over I can get you $500.00 and nobody will know it, and you will have the good will of the Master Horseshoers and the

hardware men." "We had a meeting here just a few days ago and we boycotted you. You ain't going to get any material". "The first of the month Newbury has got to quit selling you. We are going to put him out of business if he don't." "Myself and Bruce and Duffield and McGuire and Draper of Draper and Snape, went to a meeting of the Master Horseshoers and Hardware men that was had, and you aint going to get any material. You aint going to do any business."

One Newbury, who was in the horseshoers' supply business in 1913, and sold supplies to the plaintiffs, in a conversation with Jaffray and Duffield, some time in September, was told by Jaffray, who was an officer of the Master Horseshoers' Association, that the rest of the dealers in the city had agreed not to sell to the plaintiffs and that if he expected any trade from the Masters Horseshoers' Association he would have to discontinue selling them. A little later he was told by Duffield, who was President of the Journeymen Horseshoers' Union, that they were trying to get the plaintiffs in their Union and that the only way to do it was to stop them from buying goods andthat the other dealers had agreed not to sell them. He was further told that if he expected any business from the Masters Horseshoers' Association he would have to discontinue selling the Cook County Association, especially the plaintiffs. About that time he was invited to attend a meeting of the hardware dealers and the Master Horseshoers' Association and the Journeymen Horseshoers' Union; that it was some time in September; that he received the invitation over the telephone. Newbury sent his bookkeeper. From

that time on, he continued to sell the plaintiffs. He testified, "My business fell off after that, from the Master Horseshoers, and it put me behind in my business, and I was obliged to go into bankruptcy." The plaintiffs wrote and asked Newbury to procure for them 100 pairs of rubber shoes. Newbury notified them that he could not get the goods that he was boycotted. Draper, of Draper and Snape, dealers in horseshoe supplies, told Beamish in October, 1913, "there was a meeting held about three weeks or a month ago", "you know Beamish that I can't sell you, that you are boycotted, both you and Beamish and Gorman and all the other C.H.U. shops."

About November 6, 1913, A. S. Beamish told one Fox, an agent of the defendant, that he desired to pay cash for ten kegs of horseshoes to be delivered to Beamish & Gorman. Fox said: "I am sorry * * * I couldn't get their order filled, I have it written down here on the book 'them are boycotted' that is all I know."

The plaintiffs were unable to get materials at either Draper & Snape's or Paul & Fulton's, both of which firms dealt in horseshoers' supplies. One Jaffray, a former horseshoer, a member of the Master Horseshoers' Association, told Beamish, in November, 1913, that "the only way to get right and get goods is to get together in the Master Horseshoers. You won't realize a particle of trouble if you do it. You have been fighting long enough, we might as well get together." In the early part of October, Newbury informed the plaintiffs that he could not sell them anything. McGuire mentioned Jaffray, Duffield, Falconer, Durham, Draper, Coyle, Stevens, of Capewell Horse Nail Co., and himself as being present

at the meeting in September, 1913. Newbury said his bookkeeper attended for him.

One Garner, a horseshoer, about the middle of October, 1913, went to the defendant's place of business to purchase 10 pairs of Peerless shoes. He told the clerk he wanted to pay for them, but as soon as the clerk found that he wanted them for the plaintiffs he was not allowed to buy them. Two or three days later, when he represented he was from one Bailey, a member of the Master Horseshoers' Association, he was allowed to make the purchase.

The defendants' evidence is substantially as follows: A joint meeting was held on March 15, 1911. Wheeler, who formerly worked for Newbury, attended a meeting of the Master Horseshoers' Association on March 15, 1911, at which Octigon, Jaffray, Challacombe, Draper and Martha were present. He attended for Newbury and never attended any other meeting of that association and never heard of a joint meeting in September, 1913. Edwards corroborates Wheeler as to the March meeting. Edwards was recording secretary until May, 1911. He attended meetings on September 6, 10 and 24, 1913. He admits that at some meetings something may have been said by individuals, as such, concerning boycotting Beamish and Gorman or some other members of the Cook County Horseshoers' Union. Fox denied that he had ever refused to sell to the plaintiffs, or that he had any such conversation as related by plaintiffs' witnesses. Falconer, an officer and member of the Master Horseshoers' Association, says there was no meeting held in September, 1913, but various

committees held meetings, which, however, he did not attend. Chisholm says he was never a member of that association; that he was a hardware dealer. Ward, who was in the horseshoeing business, and a member of the association, and Secretary of the Board of Directors in 1913 and 1914, says there was no meeting held in September, 1913, at which restraining trade was discussed. He wrote up the minutes of September 6 and 24, 1913. No notice of a joint meeting of the Board of Directors and hardware dealers was ever sent and no such meeting held. McGuire a dealer in horseshoe supplies, denies being invited to a joint meeting in September, 1913, and says no such meeting was ever held. He attended such a meeting in March, 1911, but that meeting was to discuss audits. He denies the conversation attributed to him by the plaintiffs.

Brown, the business manager of the Master Horseshoers' Association says he knows of no meeting at that association and the hardware dealers to consider boycotting the plaintiffs. He attended a joint meeting on March 29, 1911. O'Grady, a member of the association, says he knows of no joint meeting to boycott plaintiffs, He, also, denied certain conversations attributed to him.

Jaffray, a former horseshoer testified he knew of no call for a joint meeting in September, 1913, and that there was no such meeting but that there was a joint meeting in March, 1911. Jaffray, Draper, Duffy, Durham, Clancy and Fulton, all denied the conversations attributed to them by the plaintiffs' wit-

nesses. Durham said that Challacombe told the plaintiffs and the committee that went with them that he did not want anything to do with them as he had already lost several customers through them. He further testified that there was no combination not to sell them and that at the joint meeting of March, 1911, nothing was said about a boycott.

Challacombe, of the defendant company, said that he neither received a notice of, nor attended a joint meeting in September, 1913; that there was however, a joint meeting about the middle of March 1911, at which accounts were discussed. He further testified that when Beamish and Gorman and some others visited the defendants' place in October, 1913, he told them that he could not do business with Beamish and Gorman; that it was not beneficial to the company. He also stated further that he knew the two rival horseshoers' associations had been fighting each other ever since the Cook County Horseshoers' Union was started in the year 1910. He denied certain statements which had been attributed to him.

The cause was tried before a jury and there was a verdict and judgment of $1,000.00 in favor of the plaintiffs.

In an action on the case for damages, alleged to be caused by a combination, the gravamen of the tort is the combination itself; and that may be shown to be the result of an express oral or written arrangement, or it may be shown to exist as the result of the overt acts and conduct of the parties themselves, provided the

only reasonable inference from those acts and conduct is the existence of a combination. Franklin Union v. The People, 220 Ill. 355; Harding v. American Glucose Co., 182 Ill. 551.

The evidence introduced on behalf of the plaintiffs not only tends to prove, but if believed, sufficiently proves both combination and consequent damage. Likewise, by itself, it tends to prove that the defendant and others held a meeting some time in September, 1913, at which the illegal combination was arranged. The testimony on behalf of the plaintiffs, taken by itself, amply proves both the meeting and the combination.

The testimony of Beamish and Gorman as to what Challacombe, the agent of the defendant, said in the early part of September, 1913; the testimony of Beamish that Draper, of Draper and Snape, dealers, said in October, 1913, "there was a meeting held about three weeks or a month ago," "you know Beamish that I can't sell you that you are boycotted, both you and Beamish and Gorman and all the other C.H.U. shops;" the testimony of Gorman as to what Durham said; the testimony of the plaintiffs as to what Robinson, an officer of the defendant company, said; the testimony of Beamish and Gorman as to what took place on the two occasions when with a committee they visited the place of business of the defendant; their testimony as to what Newbury said on about October 1, 1913, when they went to his place of business to buy some goods; the testimony of Gorman as to what took place when he went to McGuire's place in October, 1913; the testimony of Gorman as to what Elder, an agent of McGuire, told him; the testimony of

Gorman as to how one Jaffray tried to get him to leave the Cook County Horseshoers' Union and join the Master Horseshoers' Association, and the statements that a meeting had been held a few days ago and that the plaintiffs were boycotted; the testimony of Newbury, who was in the horseshoe supply business and sold materials to the plaintiffs, that some time in September, 1913, at Duffield's place, he was told by Jaffray, an officer of the Master Horseshoers' Association, that the dealers had agreed not to sell to the plaintiffs, and his further testimony that Duffield, who was President of the Journeymen Horseshoers' Union, said that they were trying to get the plaintiffs in their association and that the only way to do it was to stop them from buying goods, and that the other dealers had agreed not to sell them, and his testimony that he was invited to attend a joint meeting of the dealers and the Master Horseshoers' Association and the Journeymen Horseshoers' Union in September, 1913, and that he received the invitation over the telephone and as a result sent his bookkeeper to the meeting; the testimony of A. S. Beamish as to a conversation with Fox, an agent of the defendant, that Fox said, "I have it written down here on the book 'them are boycotted'"; all taken together constitute very strong evidence of the existence of an illegal combination.

On the other hand the evidence of the defendant's witnesses denies nearly all the acts from which combination might be inferred and overwhelmingly denies any joint meeting but that of March 15, 1911. It admits there was a meeting on that date at which were present Octigon, Jaffray, Challacombe, Draper, Martha and others,

but it is, also, to the effect that the subject of boycotting the plaintiffs was not considered. It admits that there were two directors' meetings and a special meeting of the Master Horseshoers' Association held, respectively, on September 6, 10 and 24, 1913. Not only is every conversation testified to by the plaintiffs and their witnesses suggesting, in any way, that a joint meeting was called and held after March 15, 1911, categorically denied, but substantially all the testimony of the plaintiffs and their witnesses in regard to being refused materials which they offered to purchase and pay for is denied. Challacombe denies in detail the conversation attributed to him. Durham admits that the defendant refused to sell the plaintiffs certain goods which they desired to purchase, but, says it was because the defendant did not want anything to do with them; that there was no combination not to sell them. McGuire denied being invited to any joint meeting in September, 1913, and says that no such meeting was ever held. He further denied the conversation attributed to him in which he was charged with having said the plaintiffs were boycotted. Edwards, a member and officer of the Master Horseshoers' Association, testified that the association never took any official action concerning boycotting the plaintiffs. The testimony of Draper, Duffy, Brown, Jaffray, McGuire, Ward and Falconer, categorically denies the calling or holding any joint meeting at which a combination was formed against the plaintiffs.

The foregoing analysis of the testimony, demon-

strating as it does the irreconcilability of what was said by the plaintiffs' witnesses and what was said by those of the defendant, shows at once that the critical question in the case is that of credibility; and where, as here, there are so many witnesses for and against, and the inherent impeaching discrepancies on each side are slight - the testimony on one side being simply denied by the other - we do not feel justified in overriding the verdict of the jury. Although the evidence that there was no joint meeting held after March 15, 1911, is very strong,yet we are of the opinion that it is but a reasonable inference from the conduct of the defendant and others, dealers and members of the Master Horseshoers' Association - the conduct testified to by the plaintiffs' witnesses - that there was an illegal combination.

We do not know positively, whether a joint meeting was held after March, 1911, nor, positively, whether the plaintiffs were combined against, but, as intimated before, there is ample evidence in support of both, if certain witnesses are believed. Of course, as said in Ill. C. R. R. Co. v. Cunningham, 102 Ill. App. 206: "The mere fact that a jury have passed upon the questions of fact cannot absolve this court from the duty of determining whether or not the verdict is justified by the evidence. That duty is by the statute placed upon this court."

After a careful consideration of all the evidence, bearing in mind whatever discrepancies are shown, balancing the probabilities and giving weight where reason adjudges

it, we have reached the conclusion that the verdict ought not to be disturbed.

Further, it is contended by the defendants that the trial court erred in admitting plaintiffs' exhibits 1 to 33. They consisted of receipted bills given by Paul & Fulton to Gorman. They were for merchandise bought from time to time between June 2, 1917 and August 29, 1917. In each instance the head of the bill had been cut off before it was given to Gorman. The plaintiff undertook to connect Paul & Fulton with the alleged combination by showing that a certain order which was placed with them they refused to fill.

Fulton, on cross-examination, was asked: "What was the object in cutting the heads off these bills?" He answered, "Well, I don't know as I can answer that question." When the admission of the bills in evidence was objected to by counsel for the defendant, the trial judge said, "I think they are connected with the other evidence so they should go in." Of course, it may be that they were given out as cash tickets and that that was the custom with Paul and Fulton, but, on the other hand, the fact that the heads were cut off, unexplained, and with the statement of a member of the firm that he did not know why they were, is evidence which we think the plaintiff was entitled to use. Further, it is true that the transactions represented by the bills occurred some time after the institution of the suit, but it may be that the combination was still

at work. Under the circumstances, such exhibits, in an evidentiary sense, are akin to declarations against interest, made after suit is instituted. We are of the opinion that they were properly admitted.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

MR. PRESIDING JUSTICE THOMSON SPECIALLY CONCURRING:

I concur in the decision announced in this case but I do not agree with all that is said in the foregoing opinion. I believe the evidence in connection with the so-called Paul & Fulton bills was incompetent and the court should have stricken those bills and the evidence concerning them from the record on the defendant's motion. In the first place this subject matter came into the case through improper cross-examination of the witness Fulton. This point is not urged however. In the next place the evidence was incompetent because it had to do with the act or declaration of an alleged co-conspirator, which took place after the conspiracy in question had been accomplished and was ended, in the absence of the party sought to be affected by the evidence (defendant) and the one said to have committed the act or made the declaration was not a defendant here and it was not sought to admit the evidence against him. Spies v. People, 122 Ill. 1; Snyder v. Laframboise, 1 Ill. 343; People v. Halpin, 276 Ill. 363.

This suit was brought to recover damages resulting from an alleged conspiracy against the plaintiff, a partnership, which conspiracy is alleged to have been consummated in 1913. It is not disputed that the plaintiff partnership was dissolved and ceased to exist in March 1915. The evidence in question had to do with certain bills or cash slips given by the firm of the witness Fulton to Gorman (who had been a member of the plaintiff partnership) in the summer of 1917. Of course the conspiracy alleged as the basis of this suit must have ended when the plaintiff went out of existence. That being the

case the evidence was not competent.

However, the proof of the alleged conspiracy is so firmly established by the other evidence, which was voluminous, compared with which the incompetent evidence referred to was of very slight importance, that the admission of that evidence should not be considered sufficient ground to reverse the judgment. Knight v. Seney, 190 Ill. 11; People v. Halpin, 276 Ill. 363.

327 - 24678

HENRY MEINSHAUSEN, Appellant, vs. KAESTNER & COMPANY, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

216 I.A. 647

MR. JUSTICE TAYLOR delivered the opinion of the court.

Claiming that the defendant had failed to pay him, the plaintiff, for certain services in procuring a contract for the erection of a brewery plant, the plaintiff brought suit, but upon the trial and near the close of the plaintiff's evidence, the court, being of the opinion that the conduct of the plaintiff showed that the contract was against public policy, directed a verdict for the defendant. Judgment was entered upon the directed verdict, and this appeal taken therefrom.

The basis of the action of the plaintiff is a writing of September 14, 1905, signed by F. A. Hecht, who when he signed it, the evidence shows, did so on behalf of the defendant company. That writing is directed to the plaintiff and is as follows:

> "In the event of your securing for Kaestner & Company the general contract for the erection of the Memphis Brewing Company plant at Memphis, Tennessee, I will agree to make you a net price on the plant ready for use and will then add to

> it anywhere from ten to fifteen per cent, to be paid to you of kind and as payments are made to Kaestner & Company, your payments to pro rata with theirs."

At the bottom of that paper there was also written, "Accepted, H. Meinshausen." The only witnesses examined were Hecht and Meinshausen, the plaintiff. The plaintiff was a traveling salesman who was familiar with machinery used in construction of brewing plants. He knew Hecht of the defendant company and also one Schneider, a brew-master, and one Marklin, who had formerly been in the brewing business. About August 3, 1905, the plaintiff introduced Schneider and Marklin to Hecht. About that time there had been some talk between the plaintiff and Schneider in regard to the promotion of a brewery at Memphis, Tennessee, and as a result, the plaintiff sent Schneider down there, paying his railway fare and hotel bills, in order to see what could be done in that direction. Shortly afterwards the plaintiff himself went down to Memphis and together with Schneider spent about a week or ten days, seeing quite a number of men there and undertaking to organize a company that would erect a brewery. Considerable work was done in Memphis both by the plaintiff and Schneider in regard to such an organization. According to a telegram from Schneider, the brewing company was actually organized on September 9, 1905. On September 14, 1905, the plaintiff went to Hecht and the writing above mentioned, which is the basis of this suit, was entered into. Subsequently, some time in the early part of October, 1905, when Schneider

and Marklin had come up to Chicago from Memphis the plaintiff was paid back by them the money which he had advanced them in regard to their expenses in connection with the organization of the brewery. On October 6, 1905, the defendant wrote to the plaintiff as follows:

> "Upon the best information I am advised that you will in no way be connected with or have anything to say about letting of contracts for the Memphis Brewing Company's plant referred to in my letter of September 14th. No company has been organized, the one organized being The Memphis Brewing & Malting Company, with which you have no connection or influence, so that my proposition of September 14th must be considered void so far as I am individually concerned or so far as Kaestner & Company were to interest themselves."

Subsequently, on behalf of the defendant, Hecht went to Memphis and arranged for the plans and specifications for the plant in connection with certain local architects, and on October 21, 1905, the defendant wrote the plaintiff a letter which contains the following:

> "Our instructions on the equipment are to prepare plans and specifications and to send them direct to the brewing company who will take competition figures against ours. This being the case we hardly think it will be possible for you nor anyone else to influence the letting of the work."

On October 26, 1905 another letter was written on behalf of the defendant to the plaintiff.

It is the testimony of the plaintiff that the day after receiving the letter of October 21, 1906, in a conversation with Hecht, the latter told him that he had been down to Memphis and had secured the plans and that the way the plaintiff had arranged it was satisfactory; that he further said, "It is perfectly right, it is per-

fectly good. Now if you can use your influence with Schneider and Marklin so I can get the contract." That he further said, "Even if competitive figures are taken in we have all of the plans ready and we know how cheap it can be built and we have all the patterns ready, and consequently we can arrange it in such a way, even if competitive figures are taken in, we will be lower anyway; you have saved us all of the preliminary expenses and nobody can figure against us." Plaintiff further testified that when he asked Hecht, exactly how he stood, that Hecht said, "You are absolutely protected; if I get the contract you will get your money."

On January 27, 1906, the defendant obtained the contract for the erection of the brewery plant, and, subsequently, received as compensation therefor certain moneys and obligations of the brewing company. The plaintiff made a demand upon the defendant for compensation for his services pursuant to his contract but it was refused.

Near the close of the plaintiff's evidence, and while the introduction of a deposition on behalf of the plaintiff was being discussed, the trial judge announced that he was going to direct a verdict for the defendant, being of the opinion that the contract was void on the ground of public policy. He intimated, also, that the introduction of certain additional testimony, under the circumstances, would only be superfluous. Accordingly, a directed verdict in favor of the defendant was rendered and judgment entered thereon.

We are unable to conclude that the evidence sufficiently shows that the conduct of the plaintiff in regard to the contract in question or the contract in question, itself, was in any way against public policy. Although the testimony of the plaintiff is at times somewhat confusing and perhaps somewhat difficult to understand, yet on the whole we think there was ample evidence to go to the jury.on the question of his employment and his commission. There is no convincing evidence that Schneider and Marklin, or either one of them, were or had been subject to any illegal influence on the part of the plaintiff as far as the letting of the contract to build the brewery plant was concerned.

Quite obviously, considering the plaintiff's evidence, thedefendant company may be said to have obtained the contract for the erection of the brewery plant as the result, in great part at least, of the services of the plaintiff. Of course, there is nothing illegal or against public policy in the latter contract. A manufacturer is entitled, in order to secure the efforts of an employee or agent, and to get a valuable contract, to promise the employee or agent, a certain percentage of the profits of the contract. That is a matter of business between principal and agent; it is merely a provision for compensation for legitimate services; the compensation may be munificent or parsimonious but the quantity does not change the quality of the contract; such a contract is in no sense illegal or against public policy.

Inasmuch as the trial court of its own motion

and before the plaintiff's evidence was all in, directed a verdict for the defendant, we are of the opinion that error was committed and that the plaintiff is entitled to full opportunity to put in all of his evidence and to have it submitted to the jury.

Under the circumstances the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

421 - 24774

ABE COHN,

Appellee,

vs.

NATIONAL DRESS MANUFACTURING CO., a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

216 I.A. 647

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Abe Cohn, brought suit in the Municipal Court of Chicago against the defendant, the National Dress Manufacturing Company to recover an alleged balance claimed to be due for commissions for the sale of certain goods of defendant to Sears, Roebuck & Co. He obtained a verdict and judgment in the sum of $1309.14. From that judgment this appeal was taken.

The plaintiff was employed by the defendant in January 1913, to sell its merchandise, ladies wearing apparel, to the mail order and jobbing trade and for his services was to receive a commission of three per cent. upon the amount of goods sold and paid for. The plaintiff represented the defendant until January 9, 1917, at which time he organized a corporation, the Cohn Sales Co.; that name being subsequently changed to Cohen Apparel Co. The defendant was to furnish the

plaintiff an account every month. That, however, was not carried out. The actual claim in the present suit is for commissions of $1150.96, accruing upon sales made between January 1, 1916 and April 31, 1916 and $658.18 accruing upon sales between November 1, 1916 and January 9 1917, less a payment of $300.00 on February 2, 1917 and a payment of $200.00 on June 21, 1917. The difference or net balance is $1309.14, the amount of the verdict and judgment.

The defendant in its first affidavit of merits denied that the plaintiff had sold goods to Sears, Roebuck & Co. as he claimed; denied that any commissions were due; and set up that all commissions had been settled and paid and that on November 24, 1916, the plaintiff accepted the sum of $353.38 in full accord and satisfaction of all claims to November 1, 1916. In a second affidavit of merits the defendant set up that in November 1917, there was a mutual accounting and that the plaintiff accepted a check for $42.76 in full of all commissions due on November 1, 1917.

The suit was begun on November 1, 1917 and summons served on the defendant on November 8, 1917. The check for $42.76 is dated November 22, 1917. On the face of the check arethe words and figures: "In full payment of balance of commissions due January 9, 1917 to November 1, 1917". It was made payable to the order of Cohn Apparel Co." Evidently, it was not, as claimed in the second affidavit of merits, given as "a full and complete accounting of all commissions due plaintiff

from defendant to November 1, 1917".

There remains then to be considered, the contention stated in the original affidavit of merits, that on November 26, 1916, it was agreed that $353.38 should be accepted by the plaintiff as a full accord and satisfaction. It is the evidence of the plaintiff that he received none of his commissions for sales between January 1, 1916 and April 31, 1916, but of those earned between November 1, 1916 and January 9, 1917, he received two payments, one of $300.00 on February 2, 1917, and one, of $200.00, on June 21, 1917 of $200.00; that the total balance unpaid then was $1309.14. The defendant contradicts the plaintiff's claim, and insists that a payment of $353.38 made and paid on November 24, 1916 was in full satisfaction of all commissions. There is plenty of evidence, however, to show if believed by the jury, that there was no accounting and accord and satisfaction. The figures of the plaintiff all tally and are quite persuasive. Exhibit B. was a paper (of three sheets) which the plaintiff testified he got from the defendant. It shows that from May 1, to October 31 1916, the plaintiff's net sales were $65,112.76, and the commission thereon at three per cent. was $1953.38. Also, that there was a credit given of $1600.00, leaving a balance of credit in the sum of $353.38. Obviously, the defendant was in error in his claim that the check for that account was given in settlement of other commissions.

The evidence is voluminous, but, after a careful examination we are of the opinion that the verdict

and judgment were justified. The plaintiff produced ample evidence of the debt, and the defendant completely failed to establish either of his inconsistent defenses.

A number of contentions are made by the defendant concerning certain questions of evidence, the examination of witnesses and remarks of opposing counsel. We have examined all of them, and are of the opinion that, in view of what the evidence definitely established, they are without merit.

Finding no material error in the record the judgment is affirmed.

AFFIRMED.

90 - 24948

FRANK H. STEPHENS,
Appellant,

vs.

MILTON A. ADAMS,
Appellee.

Appeal from
Municipal Court
of Chicago.

216 I.A. 647

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellant, who was plaintiff below, sued, claiming $40 rent due on the covenant of a written lease. Defendant pleaded payment, and denied, generally, that anything was due.

The case was tried by the court, and the finding was for defendant, and judgment was entered on the finding.

The written lease in evidence shows a demise by plaintiff to defendant of the third flat of No. 5142 North Leavitt street from 1st day of May, 1917, to 30th day of April, 1918. In it the defendant covenanted to pay as rent the sum of $480,

> "payable in monthly instalments of forty dollars each, in advance upon the first day of each and every month of said term, at the office of said Frank H. Stephens."

The lease is signed by the parties individually, and is under seal.

The lease, it appears, was negotiated on behalf of the lessor, by one Harry C. Riley, a real estate agent. It was signed by the defendant on May 20th, 1917 and on that date delivered to Riley for Stephens. Stephens returned the lease to defendant Adams on May 26th, duly executed.

The defendant on March 6, 1917, paid to Riley a deposit of $4.00, and received therefor, the following receipt,

> "CHICAGO.
> March 6th, 1917.
>
> Received of W. Adams Four and no/100ths dollars deposit on 3rd Flat on No. 5142 No. Leavitt St.

Rent to start May 1st at $40.00 per month. One Month concession.

$4.00

Harry C. Riley."

On April 27th Adams drew his check for $36 to the order of Riley, which he delivered to Riley on May 7th, taking the following receipt.

"Received of M. A. Adams Eighty and no/100ths dollars, rent of Third Flat at 5142 No. Leavitt St., for May & June 1917. this includes one month's concession.

$80.00 Harry C. Riley."

On May 1st the defendant moved into the flat. On May 26th Riley remitted to Stephens $40, less his commission for securing the lease. In making this remittance he did not mention anything about the concession. Adams paid no rent in June. Thereafter, beginning July 2, 1917, in the first days of each month of the term, he sent to Stephens checks of $40 each. With one exception, each of said checks stated that it was for a certain month's rent, naming the month, but in no case was the month of June named.

Stephens cashed the checks, presumably with knowledge of the endorsements thereon. No payment was made for the June rent. Stephens did not make a demand for such payment until May 26, 1918, after the termination of the lease, and after Adams moved from the premises.

Stephens invokes the rule that parole evidence is not admissible to vary the terms of the written lease. That rule is elementary. However, we do not think it applicable here, because the matter in controversy relates to the consideration of the written agreement, on which subject parole evidence is admissible, except where the effect of such proof would be to make the instrument itself void. Seacord v. Seacord, 160 Ill.

App. 328; Brosseau v. Lowy, 209 Ill. 405; Russell v. Robbins, 247 Ill. 510; Mayer v. Life Insurance Co., 211 Ill. App. 285.

The real question would therefore seem to be whether Riley had authority to make the concession. At the time of the negotiations his signs were on the building, he held the keys to it, he was, apparently, in control of the premises. He was not called as a witness by either party. Stephens testified positively that Riley had no authority to make the concession, and that it was made without his knowledge. It is uncontradicted, however, that he obtained such knowledge in September following the execution of the lease, and it also appears that he was reminded thereafter at least ten times during the year by the statements on Adams' checks. The principal, who desires to claim that his agent has exceeded his authority, must disavow speedily when knowledge is brought home to him, otherwise he is presumed to ratify the action of the agent. Ward v. Williams, 26 Ill. 447; Searing v. Williams, 69 Ill. 575; Pohl v. Davenport Malt & Grain Co., 46 Ill. App. 513.

We think, under all the evidence, the court was justified in finding that appellant had ratified the action of his agent in making this concession, and that he, therefore, cannot recover.

The judgment will be affirmed.

AFFIRMED.

34 - 25262

AUSTIN J. GIBBONS, Plaintiff in Error, vs. CHICAGO RAILWAYS COMPANY, a corporation, Defendant in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

216 I.A. 648

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The bill of exceptions in this case has heretofore been stricken, and the only errors assigned and argued are based upon said bill of exceptions. The defendant has moved that the judgment be affirmed. The motion will be allowed and the judgment is affirmed.

AFFIRMED.

Gio - 24864

GEORGE KARG,
Appellee,

v.

CHICAGO RAILWAYS CO. et al.
Appellants.

Appeal from
Superior Court of
Cook County.

216 I.A. 648

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants seek reversal of a judgment in appellee's favor for $1,000 as damages resulting from a collision at the intersection of Kedzie and Diversey avenues, Chicago, between a street car of the former and an automobile in which the latter was riding as a guest. The street car was going north on the former and the automobile west on the latter about 10:30 p. m.

Plaintiff's evidence tended to show that at or just prior to the collision the automobile was going from 6 to 8 miles an hour and the street car approximately 25 miles an hour, and defendants' evidence that the automobile was running about 20 miles, and the street car about 11 miles an hour as it crossed the south line of Diversey, and 7 or 8 miles at the time of collision. The witnesses differed as to the respective rates of speed of each vehicle and as to their relative positions immediately before and right after the accident. The facts were closely controverted, and as there was much evidence to show negligence in operating the street car at an excessive rate of speed across the intersection under the circumstances, and as there was no manifest preponderance of evidence to support defendants' theory of the facts as to the relative speed of the two vehicles, we shall not disturb the verdict on the ground either that defendants' negligence was

not sufficiently proven, or that the automobile was driven at a dangerous rate of speed.

A more serious question is whether the evidence preponderates in plaintiff's favor on the question whether he exercised ordinary care for his own safety. Taking the testimony most unfavorable to him it appears that when the automobile was within 10 to 15 feet from the east car rail the street car was about twice that distance from the point of collision, and that there was nothing to prevent the driver of the automobile from seeing the approaching car from the time he reached the street crossing, and that such an automobile going at the speed of 6 or 8 miles per hour can be stopped within a space of 3 feet. The street car was well lighted from the inside and by its headlight, and there was nothing in the way of obstruction or weather conditions to prevent seeing the approaching car. From such a state of facts there can be no question that there was contributory negligence on the part of the driver, who, in his position, was bound to see the approaching car in time to avoid the accident.

But of course his negligence cannot, under the general rule, be imputed to the plaintiff, who was merely an invited guest.

The material question, therefore, is whether as such guest plaintiff failed to exercise the ordinary care required of him under the circumstances. Many cases are cited on both sides of the proposition. We deem it unnecessary to differentiate them. They recognize the settled rule that a guest or passenger will not be absolved from the exercise of ordinary care for his own safety, and that what constitutes such care depends upon the special circumstances of the case. Many of them present a state of facts where the danger was as obvious to the passenger or guest

as to the driver, as, for instance, where they sat on the same seat; or where the former, though in a less advantageous position to discern the danger, had knowledge thereof in time to warn the driver or take other precautions for safety and failed to do so. But here the facts are quite different. The guest was sitting in the rear seat of an automobile with brass curtains having side windows. Nevertheless he took the precaution to see if there were signs of danger and saw none. He not only looked out of such windows on both sides but forward to watch the driver and saw him turning his head in both directions, from which he might reasonably infer that the driver would not continue to go forward if there was danger of collision, which he could not as readily determine as the driver.

It is urged that had he looked, as he claimed, he would have seen the approaching car. This would depend both on the relative speed of the vehicles and the precise point from which he looked. The car track was about 15 feet from the west wall of the building on the southeast corner of the intersection and the automobile was about 70 feet from its north wall. He said he looked south when the automobile had reached a point about 10 feet from the east line of Kedzie avenue; that from there he could see from 50 to 100 feet south on that street and saw no car. This may have been true; for if the automobile was going about 7 miles an hour and the street car 25 miles or four times as fast, then while the former was going the distance of 15 feet to reach the point of collision the street car had about 140 feet to go to reach the same point. Hence he may have looked southward just before the car came in sight, and not seeing it at such a distance away might reasonably after looking north and seeing no car rely on a safe crossing, especially as he saw that the driver in his better position also took the precaution to look in both directions. Taking such precaution and neither seeing nor hearing any approaching car, and having no

control over the driver and no knowledge of danger that required him to give any warning, it is difficult to see how he was chargeable under the circumstances with a failure to exercise ordinary care. We think the law applicable to such a situation is aptly stated in Carnegie v. Great Northern Ry. Co., 1[illegible] Minn. 1[illegible], as follows:

> "In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train something more than the ability to see and the failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he is some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety."

We find no good reason, therefore, for holding that the verdict was against the weight of the evidence either on the question of defendant's negligence or the failure of plaintiff to exercise ordinary care under the circumstances.

It is urged that instruction 9 defining ordinary care as "such care as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances" is erroneous in that it assumes that a person of ordinary prudence and intelligence would have found himself placed "under the same or similar circumstances". We think that such an assumption is not justified. The requirement of the exercise of ordinary care was, so far as plaintiff was concerned, confined to his looking, listening and warning the driver if necessary, on or after reaching the street crossing. Instruction 10 required the jury to consider that "the plaintiff at the time of said occurrence and before the happening thereof was in the exercise of ordinary care for his own safety." Instruction 11 told them that "the plaintiff

was just as much in duty bound to exercise ordinary care to look out for the approaching car and avoid injury thereby at the time and place in question, as the employe of defendants", etc, and instruction 22 that the plaintiff could not recover if they believed "from the evidence, under the instruction of the court, that the plaintiff, by using his faculties, with ordinary and reasonable care in looking out for reasonable danger, could have avoided the accident, and that he negligently failed to do so", etc. Taking the instructions as a series the jury could not well have been misled into the assumption claimed. We think it unnecessary to enlarge this opinion by differentiating the cases cited, therein a similar instruction under a different state of facts has been the subject of criticism.

It is urged that the court erred in refusing to give defendants' instructions Nos. 1, 2 and 5. All these instructions relate to the necessity of plaintiff's exercising ordinary care and being free from negligence that proximately contributed to the cause of the accident, and in that respect were covered by other instructions given at defendants' request, particularly Nos. 21, 23 and 23. It is unnecessary to set them forth.

It is urged that instruction 2 was erroneously refused also because it was the only instruction that told the jury that there was to be no comparison of negligence. It was unnecessary so to tell the jury. Besides they were plainly told in other instructions that plaintiff could not recover if guilty of any negligence that contributed to the cause of the accident even though the defendant was negligent. We find no reversible error in the case and consequently the judgment will be affirmed.

AFFIRMED.

43 - 43878

J. C. SANDERSON,
Defendant in Error,

v.

MARMON CHICAGO CO., a Corp.
Plaintiff in Error.

Error to
~~Appeal from~~
Municipal Court
of Chicago.

216 I.A. 648

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action on a stated account and defendant's check evidencing the same. The defense was that there was not a stated account, that the amount was incorrectly stated and the check delivered by mistake of fact. The case was tried without a jury. The finding and judgment were for plaintiff for $1[illegible].73.

The parties entered into a profit-sharing contract whereby plaintiff was to manage and control the paint and trim department of defendant and receive one-half of the net profits earned by such business which remained after deducting the expense thereof. The work required to be done in said department was both on said company's automobiles and those of its customers brought to it for such work.

An accounting was had pursuant to the contract between plaintiff and defendant. To that end he and defendant's accountant who had charge of its books went over the accounts and found that there was a balance due to plaintiff of $1[illegible]0.74. Thereupon the company gave him its check therefor, countersigned by its president, under whose direction the accounting was so made. After the check had been delivered the president reached the conclusion that the balance should be less, according to his construction of the contract. Thereupon he stopped payment of the check.

The tenth paragraph of the contract provides that the work "done for the Marmon Chicago Company i[illegible] to be charged to it at the

same current prices that other paint and trim shops should charge for like painting and trimming and other work"; and paragraph fourteen provides that all work done "for the Marmon Chicago Company shall be billed to it and paid for monthly". It is not disputed that the work done on the cars belonging to the Marmon Chicago Company was charged to it at such current prices, but higher prices were charged for work done on customers' cars.

The claim of plaintiff in error is that inasmuch as under the contract all work done in said department was to be credited to that department and charged to the company, it should have been charged for work done on its customers' cars at the same rate as was charged for work done on its own cars, notwithstanding the fact it collected from the customers the full prices charged them as billed to defendant company. In other words, it claimed that on the work done for outsiders, it was entitled to the excess profit over current prices; that such work came within the provisions of paragraph ten. The court held that the contract should not be so construed. We think the court was right. Under it all work done in the trim department was to be charged to it and the provision in the contract as to the prices to be charged refers only to defendant's automobiles and not to those of its customers, and the account was made out on that theory. The proof did not show any mistake of fact. Whether we view the action as one on the stated account or the check the finding and judgment were correct.

AFFIRMED.

March Term 1919.

96 - 24954

WEST DISINFECTING CO., a corporation, Defendant in Error, v. JACOB L. BRENN, Plaintiff in Error.	ERROR TO CIRCUIT COURT COOK COUNTY.

216 I.A. 648

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in the case of West Disinfecting Co., defendant in error, against Harold I. Koppelman, plaintiff in error, No. 24953, the order and judgment of the Circuit Court will be affirmed.

AFFIRMED.

March Term, 1919.

97 - 24955

WEST DISINFECTING CO., a corporation, Defendant in Error,	)	ERROR TO CIRCUIT COURT
v.	)	COOK COUNTY.
ARTHUR C. TRETOW, Plaintiff in Error.	)	216 I.A. 648

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in the case of West Disinfecting Co., defendant in error, against Harold I. Koppelman, plaintiff in error, No. 24955, the order and judgment of the Circuit Court will be affirmed.

AFFIRMED.

March Term, 1919.

98 - 24856

WEST DISINFECTING CO., a corporation, Defendant in Error, v. LILLIAN KOPPELMAN, Plaintiff in Error.	ERROR TO CIRCUIT COURT COOK COUNTY.

216 I.A. 649

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in the case of West Disinfecting Co., defendant in error, against Harold I. Koppelman, plaintiff in error, No. 24853, the order and judgment of the Circuit Court will be affirmed.

AFFIRMED.

March Term, 1915.

99 - 24957

WEST DISINFECTING CO., a corporation, Defendant in Error, v. U. S. SANITARY PRODUCTS CORPORATION, Plaintiff in Error.	ERROR TO CIRCUIT COURT COOK COUNTY.

216 I.A. 649

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in the case of West Disinfecting Co., defendant in error, against Harold I. Koppelman, plaintiff in error, No. 24953, the order and judgment of the Circuit Court will be affirmed.

AFFIRMED.

326 - 24677

JOSEPH A. COTTAM,

Appellee,

vs.

NATIONAL MUTUAL CHURCH INSURANCE COMPANY, a corporation, et al

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

216 I.A. 649

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant company seeks to reverse a judgment for $3612,50, recovered by the plaintiff on the verdict of a jury. This is the second appeal of this case to this court. On the former appeal, a judgment for the plaintiff was reversed on certain errors of procedure and the cause was remanded to the Circuit Court for a new trial. The facts involved in the case sufficiently appear in the former opinion. 209 Ill. App. 404.

On this appeal the defendant again complains of a number of rulings of the court on the admission of evidence. There was no error by the trial court in refusing to allow the deposition of the witness Cassell to be read to the jury, for the reasons we pointed out on the last appeal. The court properly sustained plaintiff's objections to questions put to the witness Magill when he was asked to state the reason why the defendant had refused to pay the loss, and also plaintiff's objections to questions put to the plaintiff when he was asked whether he had

any special person in mind when he stated in the proof of loss that the fire was incendiary. These matters had nothing to do with the determination of the issues involved. We find no error as contended, in connection with the testimony of the witness Salisbury. He had been permitted, on his examination by counsel for defendant, to give some irrelevant testimony in the way of comparing the library and furnishings of plaintiff's home, for the loss of which this action had been brought, with other houses in the town where plaintiff lived and to state whether they were above or below the average and when objection was finally interposed by counsel for the plaintiff, the court asked why objection had not been raised sooner as to that line of testimony and it was stricken out. We are of the opinion that defendant's case was not in any way prejudiced by anything the court said at that time.

One or two of the witnesses, members of the official board of the church of which plaintiff was the pastor, referred in their testimony to a meeting of that board, held during the week following the fire and testified concerning alleged conversations with plaintiff at that time. On cross-examination, counsel for plaintiff went into the question of a resolution or vote of confidence in the plaintiff, adopted by the board at that meeting. This was incompetent and irrelevant. It was not proper cross-examination as it had not been the subject of direct examination and it had nothing to do with the issues. It is urged that the court erred in denying defendant's motion to strike out this testimony which motion was made at the close of the cross examination. We do not consider the presence of this testi-

mony in the record as furnishing any ground for a reversal of the judgment. The matter was trivial and we believe could have had nothing to do with the jury's determination of the issues.

All the remaining errors assigned by the defendant, involving rulings on the evidence, have to do with the testimony of Mrs. Cottam, plaintiff's wife. One of the reasons necessitating the reversal of the former judgment recovered by the plaintiff in this case, as pointed out in our previous opinion, was the fact that although Mrs. Cottam had testified that she knew nothing about the value of the books in her husband's library, she nevertheless was permitted to state what she believed them to be worth. Defendant again complains that, notwithstanding her admitted ignorance on this subject, she was permitted to guess at the value of the books and place a value of $2338.50 on the contents of the library, including the books. We have carefully examined her testimony as we find it in the record and we find that no opinion of Mrs. Cottam's as to the value of the books was permitted to go to the jury. She is shown by her testimony to have been entirely competent to testify as to the values she gave in her testimony,- including those she gave as to certain paintings that were involved. If her competency to testify as to values was to be determined by certain isolated questions and answers, to which our attention has been called, she might well be held to have been incompetent, but a reading of all her testimony is convincing to the contrary. It is contended she testified about certain property for which plaintiff sought to collect, which belonged to her

brother, and that it was error to permit her to do so. The only instance of that kind involved a quantity of music, at least half of which she said was here and thereupon one half of the amount representing the alleged value of the music ($35.00) was stricken out and plaintiff's counsel stated that they made no claim for it.

The court did not err in sustaining plaintiff's objections to questions asked Mrs. Cottam on cross examination, in regard to the salary and employment of her husband prior to his coming to this country from England. Under the statute Mrs. Cottam was competent to testify only on the questions of the property destroyed and its value. (Ill. St. ch. 51, sec. 5) Furthermore the questions referred to were not proper cross examination.

Counsel for defendant, in cross examining Mrs. Cottam, asked her about the various appointments her husband had filled as a minister in this country and the salaries he had received. This line of cross examination was just as incompetent as the one last referred to, for the reasons stated, but plaintiff made no objection to the questions and in answering, Mrs. Cottam stated the salary her husband had received, and also referred to certain perquisites that came to him. Counsel for defendant moved to strike out that part of the answer referring to perquisites and contends that the court erred in denying the motion. We do not consider the ruling erroneous. The witness had been asked as to her husband's "salary". While not strictly responsive, her answer was substantially so.

Defendant contends Mrs. Cottam was permitted to testify about property not contained in the inventory which was the basis of the proof of loss and which is in the record. The only testimony of that kind we find in the record concerns some boxes of old papers, pamphlets and books which she says were of no value and for which no claim was made. There can be no error in that testimony.

Defendant further complains of certain instructions. The court did not err in refusing defendant's tendered instructions 1 to 7 inclusive. Some of them were fully covered by the instructions given and others did not accurately or correctly state the law. As pointed out in our former opinion the statements made by the plaintiff in his application for this insurance must, under the language of the application and of the policy, be considered as representations only and in order to find for the defendant on the ground that such statements were false it would be necessary for the jury to believe from the evidence that the plaintiff had made a material misrepresentation, willfully and with knowledge that it was false. This was not the purport of the instructions which the court refused.

We find no reversible error in the given instructions of which defendant complains. One of them was given on the former trial and was passed upon when the case was last in this court. Another one states the law involved in this case as set forth in our former opinion and referred to above. In our opinion the confusion of words contended for by defendant is without any substantial force or materiality.

The contention again made by the defendant that the policy became void because of the plaintiff's misrepresentations, is a matter on which this court passed on the former appeal. The jury were correctly instructed on this point in this trial and they have found against defendant's contention.

It is particularly urged by the defendant in effect, that the verdict is clearly against the manifest weight of the evidence. The main defense which the defendant urged to this action was that the plaintiff had himself set the fire which consumed his property, in order that he might collect this insurance. As we pointed out in the former appeal, under the law in this state, it was incombent on the defendant to establish the truth of that defense before the jury beyond a reasonable doubt. On this, as well as the other issues presented, there have been two trials and in each of them the jury found the issues in favor of the plaintiff and against the contentions of the defendant. It is, of course, true, as the defendant points out, that although the facts involved in a case may have been presented to two juries with the same result, this court may and should set the last verdict aside if the court, upon a careful review of the case, is of the opinion that it is clearly against the manifest weight of the evidence. It is further true, as the defendant also points out, where much of the testimony submitted to the jury is in the form of depositions, as was the case here, that this court is in as good a position as was the jury, to come to a conclusion upon the weight of the evidence and in such a case it may be said that ordinarily a reviewing court might properly re-

verse a judgment on a showing which might be less than would be necessary to bring about that result if the evidence was in the form of oral testimony.

But in the case at bar, the witness most concerned with the charge made by the defendant, namely the plaintiff himself, was on the witness stand and so was his wife. The same was true of theprevious trial and consequently two juries have seen these witnesses, heard them testify, have had an opportunity to observe them and conclude at least as to whether they were lying in claiming the amount of property lost and its value. Counsel for defendant makes much of the fact that the plaintiff, while on the stand as a witness, did not go into the question of the fire or make any denial of the contention of the defendant that he had set this fire himself. That subject was, of course, not any part of the plaintiff's case in chief and plaintiff contends that he did not feel called upon to take the stand on this point in rebuttal as he believed defendant had fallen far short of making out that defense by its evidence. This point,which defendant urges, loses much of its force, so far as this trial is concerned, by reason of the fact that after all the other evidence was in, counsel for the plaintiff stated to the court that although they believed that the defendant had failed to meet the burden of establishing the truth of this defense beyond a reasonable doubt and that therefore the plaintiff had nothing to rebut in this regard, nevertheless they were going to put him on the stand and he did take the stand, apparently to testify as to this feature of thecase and submit himself to cross examination upon it, but he was

prevented from so testifying by reason of the objection of counsel for the defendant on the ground that plaintiff had already testified in rebuttal and announced that he was through with his proof. Technically this was a good objection but as we have said, having made it and thus prevented the testimony of the plaintiff on this subject, when he took the stand for that purpose, even though not in the regular order and after counsel had said they were through with their proof, and even though he may have taken the stand, as defendant contends, by reason of some intimation made by the court in a conversation with counsel for the parties, the defendant rejected an opportunity it then had to get this evidence in the record and cross examine the plaintiff upon it, and after choosing that course the defendant is hardly in a position to make much of a contention that the plaintiff avoided testifying on this issue.

There are many suspicious circumstances about this fire which, in some degree, support the theory advanced by the defendant and the defense which it interposed to this action. But after a careful reading of all the testimony in the record, we are unable to say that this second verdict (in which the jury says that the defense that plaintiff himself burned up his goods has not been made out beyond a reasonable doubt and that the defense that the policy of insurance in question became void by reason of false representations made by plaintiff either in connection with his application or his proof of loss has not been made out by a preponderance of the evidence) can be said to be clearly against the manifest weight of the evidence.

For the reasons stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.

371 - 24724

NORTHERN COAL COMPANY,
a corporation,

Appellee,

vs.

WAUSHARA GRANITE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

216 I.A. 649

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment recovered by the plaintiff for the sum of $429.89. By its statement of claim, plaintiff alleged that a balance of $429.89 was due it from defendant "on an account agreed and stated," for coal sold and delivered by the plaintiff to the defendant at the latter's request. The summons was returned served on defendant "by delivering a copy to one T. F. Flynn, Agent." Appearance of the defendant was duly filed and also an affidavit of merits which was sworn to by one Thomas P. Flynn. By the affidavit of merits Flynn alleged that the defendant had never had any business dealings with plaintiff and had not purchased the coal in question and "that the plaintiff did not deliver to the defendant the coal sued for," and that there had not been an account stated between the parties.

Flynn testified for defendant that he had former-

ly been president of the defendant company which had gone out of existence in December 1916, when it sold all its assets to the Waushara Granite Quarries Company of which the witness was also president; that the latter company purchased some cars of coal from the plaintiff during 1917 and had made a payment of $100.00 on account. The check of the Quarries Company for that amount is in evidence.

The coal in question, for the payment of which plaintiff is suing the Granite Company was sold in 1917.

One Summers testifies that he had charge of the credit department of the Chicago Coal Merchant's Association and that this account was placed in his hands for collection; that on February 28, 1918, he called up "Mr. Flynn" on the telephone and that Flynn said he would take care of this account the latter part of the following week; that on several occasions after that Flynn assured him the account would be paid; that he went to the defendant's office in the Chamber of Commerce and saw Flynn there several times; that he could not say the defendant's name was on the door but he asked the elevator starter where the Waushara Granite Company was and got the information; that when he went to the office in question he asked if it was the office of the Waushara Granite Company and was told that it was.

One Erickson testified that he was assistant secretary of the plaintiff company; that statements of the account sued upon were sent once a month or oftener to the Waushara Granite Company beginning thirty days after the date of the account and that the plaintiff never received

any protest from them with reference to the account; that he had presented the account to Flynn who had promised to pay it the following week; that the plaintiff had received $100.00 on account of the coal in question and this suit was for the balance.

Summers testified that when he received the account for collection, he was given a statement by plaintiff which was a statement from the plaintiff to the defendant, giving the dates of the delivery of the coal in question and showing a credit of $100.00 on account.

One Allen testified that in April, 1918, he called on Flynn in the office in the Chamber of Commerce Building in Chicago (which Flynn testified was the office of the Quarries Company) and told him he was from the of ice of the attorney for the plaintiff and that they had the claim of the plaintiff against the Waushara Granite Company and requested payment and that he presented Flynn with the statement of the account, which was headed "Waushara Granite Company to Northern Coal Company, Dr." and that Flynn said he had been out of the city and was busy and told him he would give them a check if he returned later, that this happened several times.

We are of the opinion that the record in this case is sufficient to establish an account stated against the defendant Granite Company. Flynn was the president of that company; he accepted service of the summons in which the Granite Company was the defendant named, filed the appearance of the Granite Company or caused it to be filed and also an affidavit of merits denying the account

stated as alleged by plaintiff.

It is contended that it was incumbent on plaintiff to prove that the coal in question was sold and delivered to the defendant and not to the Quarries Company as claimed and in support of this contention, our attention has been called to Sonneschein v. Malter, 144 Ill. App. 183, where the court held that "it is only in case that goods have been sold by one person to another that an account rendered becomes an account stated unless objected to within a reasonable time." We do not consider that case in point. The account stated in the case at bar is not established by showing an account rendered and not objected to within a reasonable time but by showing an account rendered in the defendant's name to one who admits he was its president (but who now claims the defendant had previously gone out of business and that it never did any business with the plaintiff) and who is shown to have promised the payment of this account on a number of occasions when such accounts or statements were presented to him. Having made that proof plaintiff was entitled to judgment against the defendant without submitting evidence to establish that defendant was the company to which the coal had been sold and delivered. An account stated, as alleged in plaintiff's statement of claim, was fully established.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

433 - 24786

BARRETT MANUFACTURING COMPANY, Appellee, vs. CITY OF CHICAGO, et al	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
In re Intervening petition of FRANK M. FORREY, Appellant.	216 I.A. 649

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the intervening petitioner, Forrey, from an order vacating a previous order allowing his intervening petition to be filed, and also vacating all proceedings had under said petition.

Under a contract which he had with the City of Chicago for the improvement of certain streets, one Chamberlin purchased certain materials from the appellee, Barrett Manufacturing Company, and certain other materials from the F. J. Lewis Manufacturing Company. Chamberlin failed to pay the amounts he owed these two concerns for the materials so purchased, and they filed their notices of lien with the city officials as required by statute. Chamberlin reduced his claim against the city to judgment in the Municipal Court of Chicago, the amount of his judgment being $14,094.04.

Thereafter the appellee, Barrett Manufacturing Company, filed its bill to establish and foreclose its lien on the fund due Chamberlin from the city and named F. J. Lewis Manufacturing Company and the City of Chicago, as well as certain city officials, as defendants. The defendant Chamberlin answered denying the claim of the appellee and also its right to a lien, and the defendant city filed a formal answer. The defendant F. J. Lewis Manufacturing Company filed an answer and also a cross bill setting up the lien it claimed against the fund due from the city to Chamberlin.

Based upon the report of the Master to whom the cause was referred, the court entered a decree awarding the appellee, Barrett Manufacturing Company a lien on the fund due from the city to Chamberlin, to the extent of $9,967.43, and also awarding a lien to the F. J. Lewis Manufacturing Company to the extent of $3,387.24. The defendant Chamberlin prayed an appeal from this decree which was allowed upon the filing of a certificate of evidence and a bond but this appeal was not perfected.

A few weeks after the decree had been entered, the appellant Forrey appeared before the judge who had entered the decree and asked leave to file his intervening petition which was allowed over objection of appellee, Barrett Manufacturing Company. This petition set up the decree which had been entered and alleged that Chamberlin had made an assignment of his judgment against the City of Chicago and that through a number of subsequent assignments it had finally been assigned to the intervening peti-

tioner Morrey. The prayer of the petition was that the petitioner's right, title and interest in and to the judgment be protected and his rights as assignee thereof be adjudicated and the amount found to be due him be ordered paid to him. The order allowing the filing of the intervening petition, required Chamberlin and his assignee and the subsequent assignees to answer the petition but it did not require the City of Chicago or the lien creditors of Chamberlin, to answer the petition nor was such an order prayed for by the petitioner. The order specifically limited any controversy that might arise thereunder, to that between Chamberlin and his assignees and provided that the filing of the petition should "in no wise operate to change, amend, modify or reopen the decree in this court heretofore entered."

Neither Chamberlin nor any of the assignees of the judgment, answered the petition, but their defaults were not taken. However the intervening petitioner went before another judge of the Circuit Court and obtained an order referring his petition to a Master in Chancery. Counsel for the petitioner gave notice of the hearing on the petition before the master to appellee, Barrett Manufacturing Company, although it was not a party to the petition nor interested in any issue that could arise on the petition, under the order which had been entered allowing it to be filed. On this hearing, the Master proceeded to hear evidence not only upon the questions raised by the petition and covered by the order allowing it to be filed, but also upon the questions involved in the main case, including the right of the appellee, Barrett Manufacturing Company to the lien which it claimed and which the decree found it was entitled to and awarded

to it and the Master prepared a report finding that the Barrett Manufacturing Company was not entitled to the lien it claimed but that the intervening petitioner Forrey, as assignee of Chamberlin, was rightfully entitled to receive the entire judgment, except the amount due to the F. J. Lewis Manufacturing Company.

Thereupon, the appellee, Barrett Manufacturing Company, appeared before the judge who had entered the original decree and the order allowing the intervening petition to be filed and specifying the issues to be determined under that petition and on its motion the court entered an order vacating the previous order allowing the filing of the intervening petition and vacating all proceedings had under the petition, which is the order here appealed from. In support of this motion appellee, Barrett Manufacturing Company, presented the affidavit of its counsel, setting up, among other things, that when the intervening petition was presented, the court stated that it could not be filed as it had not been presented before final decree had been entered, whereupon counsel for the intervening petitioner (who was the same counsel who had represented Chamberlin in the main case) stated that all that was desired was an adjudication of the rights of the intervening petitioner Forrey, as against Chamberlin, and that it was not desired to open up the case again for a rehearing on any of the matters already decided and embodied in the decree which had been entered, whereupon the court entered an order allowing the filing of the intervening petition and defining the issues to be determined under

it as above set forth.

Assuming that the order appealed from is a final order and therefore appealable and without deciding that question we are of the opinion that the trial court did not err in entering it. The motion for leave to file the intervening petition was one addressed to the discretion of the court and likewise, the motion to vacate the order allowing the petition to be filed was one addressed to the discretion of the court. In view of the fact that the court had specifically provided in the order allowing the petition to be filed, that the petition and the proceedings under it should have nothing to do with the matters which had been settled by the decree and should be confined solely to the determination of the respective rights of the petitioner Forrey and the original defendant Chamberlin, we are of the opinion that there was no abuse of discretion on the part of the court in entering the order appealed from, when it was shown that the petitioner, upon securing a reference to a Master had submitted evidence having to do with the rights which the decree previously entered had determined, as between the complainant Barrett Manufacturing Company and Chamberlin, and had procured a finding of the Master to that effect, as evidenced by the report of the Master. The point made by appellant, Forrey, to the effect that he will suffer a complete denial of his rights as against Chamberlin if the order appealed from is allowed to stand, is entirely without merit. In any litigation which he may see fit to bring for the purpose of settling his rights as against Chamberlin, as

assignee of the judgment, the order appealed from here can in no way be considered res adjudicata.

For the reasons stated the order of the Circuit Court, appealed from, is affirmed.

AFFIRMED.

479 - 24833

In the matter of GEORGIA W. CONNERS,

Appellant,

Arrested on suit of M. LEONARD JACOBS,

Appellee.

APPEAL FROM COUNTY COURT, COOK COUNTY.

216 I.A. 650

MR. PRESIDING JUSTICE CHOMSKY delivered the opinion of the court.

This is an appeal from an order of the County Court of Cook County refusing to discharge the appellant, Georgia W. Conners, under the Insolvent Debtor's Act, from imprisonment under a capias ad satisfaciendum, issued by the Municipal Court of Chicago, after judgment was rendered against her in an action in tort.

On the oral argument of the case in this court, the question of the power of the Municipal Court to issue the writ of capias ad satisfaciendum was discussed by counsel representing the respective parties. Although the point does not seem to have been raised in the County Court and is not mentioned in the briefs filed in this court, we are of the opinion that it can properly be raised at any time as it goes to the question of the jurisdiction of the court issuing the writ which was involved in the proceedings in the County Court, from which the appeal was taken.

Upon looking into the record in this case we find that in the suit in the Municipal Court of Chicago the defendant, Georgia W. Conners, (appellant here) was defaulted for want of an affidavit of merits and that subsequently there was an ex parte hearing before a jury and a verdict, finding the defendant guilty in manner and form as charged in the plaintiff's statement of claim and the damages assessed at $550.00. The action was in tort and the statement of claim alleged a false and fraudulent representation on the part of the defendant. The issue involving the tort charged was never joined nor was it ever passed upon by the jury, in the suit in the Municipal Court. Section 1 of the Act of June 12, 1893 (J. & A. Sec. 4145) provides that no person shall be imprisoned for non-payment of a judgment in any civil action except upon conviction by a jury, unless the defendant in such action waives a jury in writing. As the defendant was not convicted of the tort alleged by the verdict of the jury, which was sworn merely to assess the damages, a writ of capias ad satisfaciendum could not properly be issued on the judgment, although the judgment itself may be a good judgment for the amount found to be due. In the matter of the Petition of Lena Warnke, 207 Ill. App. 459.

Where there is no power to issue a writ of capias ad satisfaciendum, such absence of jurisdiction in the court issuing the writ may be taken advantage of in the proceeding for discharge, although it may be said that the better practice would be to move to quash the writ in the court in which it was issued. Huntington v. Metzger, 158 Ill. 272.

We deem it unnecessary to consider other points which are argued in the briefs.

For the reasons stated the judgment of the County Court will be reversed and the cause will be remanded to that court with directions to enter an order discharging the appellant as prayed by her in the petition filed in that court.

REVERSED AND REMANDED
WITH DIRECTIONS.

496 - 24850

DANIEL M. HEALY and CHARLES L. CASWELL, Appellees, vs. KATE NOVAK and JOHN NOVAK, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

216 I.A. 650

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the Novaks seek to reverse a judgment awarding possession to the plaintiffs in a forcible entry and detainer suit brought in the Municipal Court of Chicago.

One Anderson, being the owner of the premises in question, entered into a written contract with James Novak and Kate Novak, thereby agreeing to sell the premises to them for $3,750, the terms of payment being $400 down and $32 per month thereafter with interest on the unpaid balance at six per cent per annum, payable monthly. There was a first mortgage on the premises which the Novaks agreed to renew at their expense and they also agreed to pay all taxes and assessments.

In 1913 the plaintiffs acquired title to the premises in question by warranty deed from Anderson and his wife. The Novaks made no payment on the principal, under the contract, after February 1915, and no payments were made on the interest after September 1917. James

Novak died during the winter of 1917. The first mortgage above referred to came due and the defendants failed to pay the notes and refused to renew the mortgage, whereupon the holder of the mortgage instituted foreclosure proceedings, making the plaintiffs here parties defendant and the latter filed a cross bill in that suit, seeking to have the contract of sale between Anderson and the Novaks cancelled and forfeited.

After the death of James Novak the premises in question were occupied by the defendants, Kate Novak the widow and John Novak her son, and they were so occupied at the time these forcible detainer proceedings were instituted in July 1918.

In urging that the judgment of the Municipal Court be reversed, the defendants contend that the record discloses a fatal variance between the complaint on the one hand and the summons and the proofs on the other, in that the complaint is that of "Philip A . Weinstein" whereas the summons refers to Healy and Caswell as the persons from whom the defendants are alleged to unlawfully with-hold possession, and the proofs show a conveyance from Anderson to Healy and Caswell and not to Weinstein. So far as the record shows this question was not raised in the trial court and further it is wholly without merit. The complaint recites that "Philip A. Weinstein, duly authorized agent of Daniel M. Healy and Charles L. Caswell" complains to the court that "he, the said Daniel M. Healy and Charles L. Caswell are entitled to the possession of the" premises in question "and that Kate Novak and John Novak unlawfully with-holds the possession thereof from

Daniel M. Healy and Charles L. Caswell". The complaint is signed by Weinstein. The summons directs the sheriff to summon Kate Novak and John Novak "to answer to the complaint of Daniel M. Healy and Charles L. Caswell wherefore they unlawfully with-hold from Daniel M. Healy and Charles L. Caswell the possession of" the premises in question. The evidence shows the acquiring of title to the premises in question in fee by Healy and Caswell and their right to possession of the property as against the defendants who are in default under the contract of purchase.

Defendants contend that the warranty deed from Anderson to the plaintiffs did not act as an assignment of the contract between Anderson and the defendants so as to enable the complainants to assert a claim under the statute on forcible entry and detainer. This contention is also without merit. The plaintiffs were entitled to possession of the premises, under and by virtue of the warranty deed from Anderson to them as against the defendants who were in default under their contract of purchase and when they with-held possession of the premises after demand in writing by the plaintiffs who were entitled to such possession, the latter were in a position to institute these proceedings. It appears from the record that the Novaks began to make payments under their contract to Caswell and Healy in August, 1913, and thereafter made no payments under the contract to Anderson whose deed to Caswell and Healy bears date June 24, 1913.

It is also urged that the Superior Court of

Cook County had jurisdiction of the subject-matter in this case and therefore the trial court should not have entertained it. In our opinion the fact that the plaintiffs in this case, have been made defendants in foreclosure proceedings involving the premises in question, brought by the parties holding the mortgage, and in that case these plaintiffs have filed a cross-bill seeking the cancellation of the Novak purchase contract, has nothing to do with their right to secure possession of the premises as against the Novaks in proceedings such as are authorized by the statute on Forcible Entry and Detainer. It appears from the record thatan attempt was made in connection with the proceedings in the Superior Court to secure an order restraining the further prosecution of this case at bar but the Superior Court denied the motion.

It is further suggested that there had been no probate of the estate of James Novak and therefore it was not properly determined who were his heirs or next of kin and that no administrator or executor had been appointed to properly administer his estate. The evidence in this record shows who the heirs at law and next of kin of James Novak were. That matter may be the subject of proof in any court, but in our opinion, this matter is entirely beside the question involved in this case, which has to do solely with the question of the right of possession as between the plaintiffs and the defendants, the latter being in possession and being the only parties in possession.

Finding no error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

521 - 24933

A. C. DICUS,

Plaintiff in Error,

vs.

WILLIAM SLAVIK and JOHN RUZICKA,

Defendants in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

216 I.A. 650

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the complainant Dicus seeks the reversal of a decree of the Circuit Court, providing that he pay the costs of the suit at bar to be taxed by the clerk of the court.

The complainant filed his bill against the defendants, seeking to remove a cloud on the title to his homestead which consisted of lots 45 to 48 in block 4 in a certain addition in Oak Park, Illinois. Complainant also claimed he owned an undivided one-twelfth interest in lots 45 to 48 in block 3 in the same addition. The defendants, Slavik and one Scherer, claimed to be owners of these latter lots and the question of their title was in litigation between the three parties named. While this litigation was pending Dicus and Slavik came to an agreement whereby Slavik agreed to pay Dicus $125 for the interest he claimed in these lots. Pursuant to this agreement Dicus gave Slavik a quit claim deed but he made a mistake in drawing up the deed and described the property, which

the deed purported to convey, as his interest in lots 45 to 48 in block 4", which was his homestead. The mistake was not noticed by Slavik and he later sold his equity in the lots in block 3 to the defendant Ruzicka and in conveying, he copied the description in the deed he had received from Dicus. Some time later the complainant Dicus discovered the error and went to Slavik about it and later to Ruzicka. As to what took place when the complainant talked with the two defendants the evidence is in conflict. The complainant testified that each of the defendants refused to quit claim any interest they might have of record in the lots in block 4 in exchange for a quit claim deed of the complainant to the lots in block 3 without a consid ration. Slavik denied this but testified he told Dicus that he had conveyed the property, described in the deed from Dicus to him, by a later deed to Ruzicka; that he told Dicus that if there had been an error Ruzicka would straighten it out. In the answer filed by the defendant Slavik, he took the position that Dicus, in fact, had no interest in the lots in block 3 and that the $125 which he had paid Dicus for the deed of the latter was without consideration and that Dicus ought to return that money to him in exchange for any deed which he might execute to correct the error that had been made. The defendant Ruzicka also denied that he had demanded any consideration from Dicus, but said that when Dicus demanded that he and his wife sign a quit claim deed he told him he would have to look into the matter and talk it over with Slavik, whereupon, Dicus told him he would make him pay the expense if he did not sign the deed, and Ruzicka told him that he had never known him before and would have to know something

about him first.

When the complainant did not get the deeds as demanded by him from the defendants he filed this bill, setting up the facts and among other things alleging that the defendants "entered into a collusion for the purpose of pretending that the property to be conveyed to the said William Slavik and re-conveyed to the said Ruzicka was" the complainant's homestead.

After hearing the evidence the Master found that the mistake in describing the property deeded was the mistake of the complainant and that Slavik copied the misdescription when he conveyed to Ruzicka. He also found that the transaction between Slavik and Ruzicka was bona fide and without any knowledge on the part of either of the parties that a misdescription of the property was involved and that the consideration, moving from Ruzicka to Slavik, was the cancellation of an indebtedness of something over $800 which Slavik owed Ruzicka and some additional cash which Ruzicka paid Slavik; that defendants did not enter into any collusion and were in no way responsible for the situation which the facts presented. The Master further found that the defendant Ruzicka should have been given a reasonable time to investigate the facts claimed by the complainant and to secure a quit claim deed to correct the deed in question. It appears from the record that the complainant filed his bill the day after his call upon Ruzicka. The Master recommended that the relief prayed for in the bill of complainant be granted and that the deeds in question be set aside as clouds upon the title of complainant's homestead and further that the

costs of the suit be taxed against the complainant. Objections and exceptions to the Master's report, filed by complainant, were overruled and a decree entered in accordance with the recommendation of the Master.

After a careful consideration of this record we have come to the conclusion that all the costs should not have been taxed against complainant. In our opinion both complainant and defendants are at fault as to this litigation. We concur in the finding of the Master, approved by the chancellor, to the effect that the mistake in the quit claim deed was that of complainant and that he was too hasty in filing his bill and charging collusion on the part of the defendants to put a cloud on his title. Complainant should have afforded Ruzicka a reasonable time to investigate the situation and exchange deeds with him. On the other hand both defendants had more than a reasonable time to find out that a mistake had been made in describing the property conveyed or sought to be conveyed by the deed from complainant to Slavik, as the complainant contended, before they were called upon to plead to complainant's bill and they should and probably did know that the alleged mistake had been made, when they filed their original pleadings in this case. But instead of answering complainant's bill denying the collusion alleged and admitting the mistake in complainant's deed as claimed by him they filed a series of pleadings which evidenced anything but an effort to bring the matter to a conclusion without an extended trial. The wives of defendants filed disclaimers which did not disclaim and exceptions to them were sustained and new disclaimers were filed. Complainant's exceptions to the answers filed by the defendants were also sustained,

and other answers were filed. Neither defendant in his answer admitted that the mistake alleged had been made. Slavik did not even deny the alleged collusion in his first answer, as he did in the second answer filed by him, but set up that he had paid complainant $125 for the deed to him purporting to convey complainant's interest in the lots in block 3 but that in fact complainant had no interest in those lots as he well knew; that therefore there was a failure of consideration for the payment of $125 to complainant and before he should be required to quit claim the property which complainant had described in his deed to him, complainant should be required to return the $125. The fact that Slavik is not contending here that this money should be returned to him and, it seems from the record, did not even press the matter before the Master, would seem to indicate that it was not raised in his answer in the best of faith. These defendants were men of affairs. Ruzicka was in the real estate business. Even when the cause came on for a hearing before the Master, they did not admit that a mistake had been made. Their counsel announced at the opening of the hearing that the defendants were "willing that any mistake that may have been made may be corrected"; but they were contesting the collusion charge. Of course if the evidence to be taken demonstrated that a mistake in the deed in fact had been made, creating a cloud on complainant's title, it would be corrected whether defendants were willing it should be or not. It was not until the taking of testimony was nearly completed before the Master that defendants admitted that the mistake claimed had in fact been made. If the

defendants had pursued the course we have indicated they should have, upon finding the mistake had been made as claimed, we would have affirmed the decree taxing the costs against complainant. But with all the parties to this suit at fault in unnecessarily bringing and prolonging this suit we are of the opinion that the decree should have provided that the clerk's costs for filing of complaint and appearances of defendants be taxed against complainant and that the Master's fees and remaining costs be taxed, one-half against complainant and one-half against the defendants.

We cannot conclude, as the defendants contend, that the course pursued by complainant in his effort to have the decree of the trial court reversed, first in the Supreme Court and then in this court, was merely for delay.

The decree of the Circuit Court is modified as indicated and as so modified, is affirmed. It is further ordered that half the costs in this court be taxed against the plaintiff in error and the other half be taxed against the defendants in error.

DECREE MODIFIED AND AFFIRMED.

236 - 24637

GUSTAVE E. SCHMIDT,

Appellee,

vs.

NESTOR JOHNSON MANUFACTURING COMPANY, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

216 I.A. 650

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant in the Municipal Court of Chicago. There was a finding and judgment in his favor for the amount of his claim, $857.95, to reverse which defendant prosecutes this appeal.

The record discloses that defendant was engaged in the business of manufacturing ice skates in Chicago, and had employed the plaintiff for about eight or nine years as shop foreman; that for the fiscal year beginning March 1st, 1915, plaintiff was paid a weekly salary of $30.00, and at the close of the year in addition thereto a bonus of $180.00. This bonus was computed at one per cent of the gross sales of defendant for that year in excess of $40,000. There was also in the employ of defendant during this year and for several years previous, Julian T. Fitzgerald and Alfred Johnson. Fitzgerald was Secretary of the company and also acted as salesman. Alfred Johnson was in charge of the assembling room. Both of these men were also paid a bonus of $180.00 at the same time and on the same basis as plaintiff. Plaintiff's

theory was that he was entitled to a bonus for the year beginning March 1, 1916, of one per cent of the gross sales for that year in excess of $40,000.

It was the contention of defendant that the bonus of $180.00 paid for the fiscal year of 1915 was a mere gratuity, and that there was no agreement to pay a bonus of one per cent for the year 1916 and, therefore, the plaintiff was only entitled to his weekly salary which had been paid. Both parties seem to agree that whatever claim plaintiff has grew out of the annual meeting of the stockholders of defendant company held March 25, 1916. The evidence as to what took place at that meeting is in sharp conflict. All of the directors and officers of the company, except Mrs. Annie Johnson, wife of the President of the company, who was a director and the treasurer, and Julian T. Fitzgerald, Secretary, were present. The stockholders were all there. The record shows that at that time the stock of the company was owned as follows: Nestor Johnson, $31,000; Dr. C. A. Krogh, $5,000.; Alfred Johnson, $1,500.; Gustave M. Schmidt, $1,000.; and John Gapinski, $500. Plaintiff testified that at that meeting the President of the company, Nestor Johnson, said something about paying plaintiff compensation in addition to his weekly salary, and that the president stated that the "same arrangement will be for the coming year as was for the year before, and I hope it will be satisfactory to you and Gustave M. Schmidt, Alfred Johnson and Julian T. Fitzgerald, and others whom I may select to get the bonus, they will get the same arrangement"; that the stockholders and everybody present assented by nodding their heads that it was all right. Alfred Johnson, who was a brother of the president, testified

that he had been with the company for sixteen years; that there was a conversation between the president and the plaintiff in regard to compensation in addition to salary; that after the report for the year 1915 had been submitted, which showed $180.00 bonus to the plaintiff, the witness, and Fitzgerald, the president said that the same arrangements would be made for the coming year in reference to the bonus for these three men, and that he wanted others whom he might select later to be paid the bonus also; that everybody nodded their heads that it would be all right. For the defendant, Martin Thompson, a son-in-law of the president, testified that nothing was said at that meeting in reference to the payment of any bonus; that the president did not say that the same arrangement would be made for 1916 as had been in effect the year previous. Dr. Krogh, who attended the meeting in March, 1915, testified that there was something said at that meeting about the payment of a bonus, but at the meeting of 1916, he did not hear the president say that the same arrangement would be made for that year, and that the president did not ask anyone if the arrangement was satisfactory. Nestor Johnson testified that he did not say anything about any bonus and that there was no mention of it. John Gapinski, the other person at the meeting, was dead at the time of the trial. At that meeting the plaintiff and Alfred Johnson received their checks for the bonus of $180.00. Fitzgerald was not present but received his later. The annual report of the Secretary showing the financial condition of the company was submitted and approved at that meeting. It shows that the gross sales for the fiscal year 1915 were $58,000, and also contains the following:

"Bonus of 1% on sales over $40,000 - Am't over	$18,000	
J. T. Fitzgerald		$180.00
Alfred Johnson		180.00
G. E. Schmidt		180.00"

In the minutes of that meeting it appears that a motion "was made and seconded that a bonus of 1% shall be paid to J. T. Fitzgerald, Alfred Johnson, G. E. Schmidt and to any other persons whom Mr. Nestor Johnson may deem it advisable on sales above and over $40,000.00 in the skate business for the ensuing year." About ten months afterwards, February 15, 1917, at a special meeting of the Board of Directors, a resolution was passed stating that the above provision in the minutes of the meeting of March, 1916, was never passed and had been recorded by mistake of the secretary, and it was resolved that it be expunged from the record.

Nestor Johnson, the president of the company, owned about 81% of the stock, and seemed to be in full charge of the business. About the 1st of January, 1917, he sold out his interest to one Clark who put a Mr. Williams in as superintendent of the factory. Shortly afterwards, plaintiff, Alfred Johnson and Fitzgerald seem to have become dissatisfied with the way the business was being conducted and about the middle of February following, conceived the idea of forming a company and manufacturing skates in their own behalf. About the close of the fiscal year, March, 1917, negotiations were had between the plaintiff and defendant with a view to continuing the employment of the plaintiff, who took the position that he would not consider the matter until he was paid his bonus. Defendant refused to act on the bonus until a contract of re-employment had been entered into. No agreement having

been reached, plaintiff left defendant's employ as did also Fitzgerald and Alfred Johnson and started a competing company.

The plaintiff's statement of claim on which the case was tried, was based on three theories: (1) that the plaintiff entered into an oral agreement with the president of the defendant company for the bonus; (2) the resolution passed at the meeting in March, 1916, and (3) a holding over by the plaintiff on the same terms of employment as were in effect the previous year. Defendant's contention is that neither theory is sustained by the evidence nor the findings of fact. After a careful consideration of the evidence we are unable to say that the finding of the court that plaintiff was employed by defendant at the meeting of March, 1916, for the fiscal year, and that part of the consideration to be paid him was the bonus mentioned, is against the manifest weight of the evidence. This was a small corporation and its method of transacting business at meetings and the keeping of the records of such meetings were rather informal. Defendant contends that the purported resolution which appears in the minutes of the meeting was never passed, that it was simply "made and seconded"; that all the evidence shows that no vote was had on the proposition. An examination of the minutes of this meeting shows that several other business matters were disposed of at the meeting, and the minutes simply show that a motion was "made and seconded." We think the evidence was sufficient to warrant the trial judge in finding that all the parties acquiesced and agreed that the bonus should be paid plaintiff, and while it is true that matters of this kind are

transacted by the directors and not by the stockholders of a corporation, yet all the directors with the exception of Mrs. Annie Johnson were present. Moreover, the plaintiff worked throughout the year and no repudiation was had at any time. Any rights he acquired could not be taken away by the directors expunging the resolution the following February. But counsel for defendant say that this conclusion is contrary to the findings of fact and propositions of law held by the trial judge. While there is some apparent conflict in this regard, we think it is more apparent than real. Counsel argue that since the court held the bonus of $130.00 for the fiscal year 1915 a gratuity, and since the evidence most favorable to the plaintiff only shows that the same arrangement was made for the year following, any promise of bonus for 1916 would likewise be a mere gratuity. We think there is some confusion as to the meaning of the term "bonus". The word as used here does not mean a gratuity but it means additional compensation. Bouvier defining bonus says, "It is not a gratuity but is paid for some service or consideration that is in addition to what would ordinarily be given." We think there was sufficient evidence to warrant the court in finding that there was consideration for the bonus promised. The court found as a fact that the defendant during the month of March, 1916, had notice of the agreement entered into by the president and the plaintiff whereby the plaintiff was to receive from the defendant the one per cent bonus.

Since we have held that the finding of the court that there was a valid and binding agreement entered into at the meeting in March, 1916, was not against the manifest

weight of the evidence, it will be unnecessary to discuss other points made by the defendant as to whether there was mutuality of obligation, and the rulings of the court on the propositions submitted on that theory, nor do we think it necessary to discuss the sufficiency of the statement of claim further than to say that the first two theories were sufficient to warrant a recovery and are supported by the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

293 - 24649

HATTIE J. CHURCH, Administratrix of the Estate of William Henry Breidenthal, deceased, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
vs.	
MANDEL BROTHERS, a corporation, Appellant.	

216 I.A. 650

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against defendant to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant. The jury returned a verdict in favor of plaintiff for $1800.00. There was a remittitur for $300.00 and judgment entered for $1500.00 to reverse which defendant prosecutes this appeal.

The record discloses that at about eight-thirty or nine o'clock on the morning of June 10, 1915, the deceased then nearly seventy-nine years old, while walking across Halsted street, was struck and killed by an electric truck belonging to defendant. There is not much dispute in the evidence. Halsted street extends north and south and the roadway is occupied by two street car tracks. Wolfram street is an east and west street and extends east only to the west line of Halsted street. It is not cut through east of Halsted. On the morning in question deceased was walking east on the south side

of Wolfram street intending to make some purchases at a store located on the east side of Halsted street, opposite Wolfram street. There was a vegetable wagon in Wolfram street also going east. The electric truck was being driven south in Halsted street in the west street car track. The chauffeur was at his accustomed place on the driver's seat, and beside him was a boy who assisted in making deliveries. As they approached Wolfram street they were traveling at the rate of about ten or eleven miles per hour, which was as fast as the car could be made to go. When the chauffeur saw the vegetable wagon approaching Halsted street, he sounded his horn and shut off the power, as he did not know whether the vegetable wagon would continue or whether it would stop to let the electric truck pass. The wagon stopped at the west side of Halsted street, and at this time the truck was opposite the north half of Wolfram street. The chauffeur then seeing the wagon stop, again put on the power and increased his speed. As he did so the deceased came into Halsted street south of the truck and was struck by the right front wheel which passed over him. When the truck was stopped, which was within a few feet, the boy jumped off and discovered that the right rear wheel was on the deceased. He told the chauffeur to back up, which he did, and in doing so he backed too far and the front wheel passed over or onto the deceased. He was taken from under the truck and died a few minutes later.

There were seven counts in the declaration. The first charged that the truck was driven in a public highway at a greater rate of speed than was proper having regard to

the traffic and the use of the street, contrary to the statute; the second, that it was being driven at such a speed as to endanger the lives and limbs of persons lawfully on the street; the third, that the speed was greater than ten miles per hour in a closely built up portion of the city, contrary to the statute; the fourth, that the speed was greater than fifteen miles per hour in a residence portion of the city, contrary to the statute; the fifth charged there was no reasonable warning of the approach of the truck given by sounding the horn or other device; the sixth charged wanton and willful negligence, and the seventh, negligence generally. Each of the counts alleged that the deceased was in the exercise of due care for his own safety. It was averred that the deceased left him surviving his widow and four grown children, the youngest of whom was about thirty-eight years old.

For the plaintiff the witness Schalk testified that he was on the south side of Wolfram street about one hundred feet west of Halsted street walking east; that the deceased was ahead of him; that deceased walked like an old man; that he stepped off the sidewalk into the roadway of Halsted street about two feet when he was struck by the truck; that the truck was between the west street car track and the west curb; that he did not know whether the deceased looked or stopped before attempting to cross Halsted street; that the truck was going slowly; that he heard the driver holler "Hey" and that the truck stopped with the back wheel on the deceased. The witness Westman testified that he lived seventy-five feet from the corner

of the two streets; that he was on his front porch and heard someone "holler for the machine to back up"; that he looked and saw deceased under the truck. Alfred Richter testified that he was walking south on the east side of Halsted street just opposite Wolfram street; that the accident happened in the southbound street car track; that he heard someone holler "Hey"; that he looked and at that time deceased was five or six feet in front of the truck; that deceased was struck and run over.

For the defendant the chauffeur testified that he was driving south between ten and eleven miles per hour, which was as fast as the car could go; that there was a wagon coming east on Wolfram street and he blew his horn and shut off his power; that he slowed down to see if the wagon would stop; that the wagon came to a stop and he again applied the power; that "this old man appeared to be coming kind of northeast"; that he kept coming until he was about two feet from the path of the truck and then turned straight north as though he were going to let the truck pass by him to the east; that when the truck was a few feet from him, the deceased suddenly turned east right in front of the truck; that the witness then "hollered Hey", put on the brake and stopped the truck, but it was too late; that the truck was covered and he could not see the deceased after he was knocked down; that he was told to back up and did so; that prior to the time of the collision the deceased appeared to be looking at the truck; that the truck was about twelve or fifteen feet long and weighed about 4200 pounds; that he did not sound the horn as he had no time to do so.

Charles Posack, the boy on the seat with the chauffeur who was about twenty years old, testified that the vegetable wagon came to a stop west of Halsted street and he felt the power of the truck being shut off; that he saw deceased in front of him walking with his head down; that he turned to the east in front of the machine and the witness "hollered at him"; that the truck was stopped and the witness jumped off and saw the rear wheel touching deceased's body; he told the driver to back up a couple of feet; that the driver was excited and backed up too far, so that the front wheel passed over the deceased.

Defendant contends that the evidence shows that there was no negligence in the operation of the truck, and that the deceased was guilty of contributory negligence, and, therefore, the court should have directed a verdict at the close of all the evidence as requested. As a general proposition the question of contributory negligence is one of fact for the jury, and only becomes one of law when the evidence clearly shows that the accident resulted from the negligence of the injured party. If there be any difference of opinion so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Bale v. Chicago Junction Ry. Co., 259 Ill. 476; Louthan v. Chicago City Rys. Co., 198 Ill. App. 329. In determining whether there should be a directed verdict on the ground that defendant was not guilty of the negligence charged, the rule is that if there is in the record any evidence from which, if it stood alone, the jury might, without acting unreasonably in the eye of the law, find that the material averments of the declaration have been proven, the

case should go to the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206. Under the evidence which we have set forth rather fully, we think the case was a proper one for the jury.

It is next insisted that the verdict is excessive; that the evidence shows that the deceased was without any income except a pension which he received from the government of thirty dollars per month; that he and his wife lived with a married daughter in a five room apartment, and that the daughter had two minor children, one about twelve and the other about fourteen years old; that deceased contributed to the household expenses and that he tended the furnace and took care of the children and did other jobs around the house. In support of its contention defendant relies on the case of Chicago Terminal Transfer Co. v. Melbrig, 99 Ill. App. 563. Plaintiff also cites and relies on this case. There the deceased was about eighty-one years old. He lived with a daughter on a farm which he rented and which he assisted in cultivating. He was struck by a train and killed. There was a verdict of $5,000. The court ordered a remittitur of $3,500 and entered judgment for $1,500. This court held that the verdict was so excessive as to justify the inference that the jury was actuated by prejudice. The judgment was reversed. The court said, however, that if the verdict "in the first instance had been for $1,500., we would probably not disturb the judgment entered on it." That case was decided in 1902, and if $1,500 was not excessive at that time, we think it clear that in these times the

verdict in the instance case cannot be considered excessive. We cannot be unmindful of the fact that the money value of life and health is appreciating and the purchasing power of money steadily depreciating during recent years. De Pillipi v. Spring Valley Coal Co., 202 Ill. App. 61; Delohery v. Quinlan, 210 Ill. App. 321.

Complaint is made to thegiving of a number of instructions advising the jury that if the plaintiff had proven her case as laid in her declaration or any count thereof, by a preponderance of the evidence, etc., she was entitled to recover. It is said that there is one count in the declaration in which no liability is alleged. Even if this be conceded, there is no error. Proof of one good count is sufficient. However, an instruction was given on behalf of the defendant on the same theory, and, therefore, it cannot complain. It is also said that the court erred in giving instructions Nos. 4 and 5, and in refusing to give an instruction submitted by defendant. It is said instruction No. 4 was wrong in that it warranted recovery if the jury believed from the evidence the negligence charged in the declaration "caused the death of the deceased" without reference "to whether it proximately caused the death," and the jury may have believed there was no negligence in the operation of the truck in the first instance when it ran over the deceased, but they might think there was negligence in backing up over him afterwards. It is further insisted that this instruction was also bad because it told the jury that they were to decide the facts under the law without telling them further

that they should do so under the instructions of the court, and that instruction No. 5 is subject to the same objection. We think the objection is not well taken. The jury were told in a number of instructions that there could be no recovery unless the deceased came to his death as a proximate result of the defendant's negligence charged in the declaration. They were also told that their verdict should be based on the law as laid down in the instructions of the court.

The refused instruction sought to tell the jury that in considering the cause of the death of the deceased they should disregard the backing up of the truck. Counsel for plaintiff justifies this on the ground that the fact of the backing up of the truck tended to show willful and wanton negligence as charged in the declaration. We think it clear that there is no evidence of any wanton or willful negligence in the case. The truck was not being driven at an excessive rate of speed, and the backing up of it was done in an endeavor by the chauffeur to extricate the deceased from under the wheels. In this respect we think the chauffeur did the best he could under the circumstances. There is certainly no ground to say that he willfully backed up over the deceased. But we think the refusal of this instruction was proper for the backing up of the truck might tend to show negligence which contributed to the death of the deceased. The other instructions offered by the defendant were properly refused.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

370 - 24658

WILLIS J. RAYBURN,
Appellant,

vs.

SAM A. MENDELSOHN,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

216 I.A. 651

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $1,000.00 for services rendered in negotiating and financing a ninety-nine year lease on certain real estate in Chicago. The case was tried before the court without a jury. There was a finding and judgment in favor of the defendant to reverse which plaintiff prosecutes this appeal.

The only point made by the plaintiff for the reversal of the judgment is that the finding of the trial judge is against the manifest weight of the evidence.

The record discloses that sometime prior to July, 1912, defendant purchased from plaintiff and another, a saloon at 61st street and Cottage Grove avenue, Chicago; that thereafter defendant conducted the business of running the saloon. In July, 1912, defendant was advised that the owner of the property was negotiating for the sale of it to one Snell. Snell and his real estate broker took the matter up with defendant in an endeavor to have him take a ninety-nine year lease of the premises in case

Snell should purchase it. Shortly thereafter defendant communicated this fact to plaintiff, who had been a friend of his for some time, and thereupon plaintiff, who had been in the real estate business ten or twelve years, took charge of the matter on behalf of the defendant. After three or four weeks of negotiations, the sale was consummated and defendant obtained a ninety-nine year lease on the property. Plaintiff received from Snell $1,100.00, which was one-half of the real estate commission. Defendant paid plaintiff nothing for the work he did.

In bringing about the consummation of the deal plaintiff did a great deal of effective work. He put up $10,000.00 in escrow pending negotiations to see that the deal did not fall through; did some further work in reference to seeing that the ninety-nine year lease and escrow agreements were made, and took part in negotiating a loan of $15,000.00. Plaintiff testified in his own behalf that when the defendant first spoke to him of the matter, defendant stated that he had no money. Plaintiff thereupon said that for financing the matter for defendant he would charge him $1,000.00, which defendant agreed to pay; that about six or seven months after the deal was closed plaintiff sent defendant a bill, and a number of times afterwards spoke to him about payment, and defendant always said he would pay but did not have the money. Plaintiff further testified that some time in the Fall of 1914 he met defendant together with Attorney Fell in Frank's saloon on North Clark street; that at that time in the presence of the four he asked defendant for the $1,000.00 and defend-

ant replied that he would pay the $1,000.00 when plaintiff had done as he had agreed, viz: secure a contract for defendant with some brewery for the purchase of beer; that plaintiff replied he did not understand that the beer contract had anything to do with the transaction; that he had endeavored to secure this contract with a brewery before the making of the lease, but that if defendant considered it was part of the contract, he would endeavor to get such contract; that thereupon defendant said that if plaintiff would secure the beer contract, he would pay him the $1,000.00 and buy him, in addition, an automobile. Fell testified to the same effect. Frank, who had been subpoenaed by plaintiff, testified that no such conversation took place in his presence. The conversation was specifically denied by defendant. The evidence tends to show that afterwards plaintiff assisted defendant in securing a contract with the Manhattan Brewing Company, which was consummated about May, 1915; that three or four weeks afterwards plaintiff demanded payment and defendant again stated that he did not have the money. Defendant denied that he had ever received a bill from plaintiff or any demand for payment of the $1,000.00, and knew nothing of such a claim until he was notified by plaintiff's lawyer shortly before the suit was commenced. Other evidence was introduced concerning the negotiations for loans, which we think in no way affects the result.

We have carefully considered all the evidence in the record and unless we can say that the finding is against the manifest weight of the evidence, the judgment should stand. The trial judge was in a much better posi-

tion to determine the facts than we are. He saw and heard the witnesses on the stand and came in personal contact with them. After careful consideration we are unable to say that the findin, was against the manifest weight of the evidence, and, therefore, the judgment must be affirmed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

316 - 24667

TEMPLETON LIME COMPANY, a corporation, Appellant, vs. CHARLES L. W. BARTLING, et al, Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

216 I.A. 651

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal complainant seeks to reverse a decree of the Superior Court of Cook County dismissing its bill at its costs for want of equity.

The record discloses that complainant filed its bill seeking to enforce a mechanic's lien as sub-contractor for $539.80. After issue joined the case was heard before the chancellor and a decree entered in favor of defendants. There is no dispute as to the facts. Complainant was a sub-contractor and gave the statutory notice required by Sec. 24, Ch. 82, R. S., but before this was done the original contractors had been adjudicated bankrupts, and the sole question to be decided is whether the adjudication in bankruptcy defeates complainant's lien. The chancellor held that it did, apparently relying on authorities based on a previous mechanic's lien act. Subsequent to the entry of the decree in the instant case, another division of this court in the case of Pittsburg Plate Glass

Co. v. Huberty, Gen. No. 24656, opinion filed March 10, 1919, carefully considered the question before us, and held that where a sub-contractor complies with all the provisions of the statute, he will have a lien from the date of the original contract and that his lien is not defeated by the fact that the original contractors were in the meantime adjudicated bankrupts. That case was reviewed by the Supreme Court of this State and on December 17, 1919, an opinion filed where the conclusion of the Appellate Court on the mechanic's lien phase of the case was upheld. It follows, therefore, that the decree of the Superior Court of Cook County is erroneous and it is reversed and the cause remanded with directions to enter a decree awarding complainant a lien as prayed for in the bill of complaint.

REVERSED AND REMANDED
WITH DIRECTIONS.

445 - 24798

IN RE ESTATE OF HADA HOAG, Deceased,
JANE R. HOAG and FLORENCE L. NELSON,
Appellants

vs.

CHARLES B. HOAG and EMIL J. HOAG,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

216 I.A. 651

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by Gust W. Hoag, Administrator of the Estate of Hada Hoag, deceased; Jane Hoag, his wife; and Florence L. Nelson, his niece, from a judgment of the Circuit Court of Cook County.

On December 22, 1912, the claims of Jane R. Hoag for $150.00 and Florence L. Nelson for $330, which had been filed in the Probate Court of Cook County in the estate of Hada Hoag, Deceased, were duly allowed and classified by the court. At that time no objection was made to the allowance of either of said claims; and no steps were taken to have said order of allowance modified, vacated or set aside until March 18, 1914, about 15 months after the orders of allowance were entered. On February 16, 1914, the administrator filed his final report which showed, among other things, that the two claims in question had been paid. On March 18, 1914, Charles B. Hoag and Emil Hoag, the appellees, filed written objections in the Probate court alleging collusion and fraud and praying that the orders allowing the claims be set aside and vacated and that the claims be dis-

missed. On March 24, 1914, the administrator filed an answer to the said objections setting up, among other things, that fourteen terms of said Probate Court had expired since the claims were allowed and it then had no further jurisdiction and no authority to set aside or vacate the order of allowance of said claims "except for fraud or mistake".

The record shows that on July 16, 1915, the following proceedings were had in the probate court:

> "This cause coming on to be heard upon the claims of Jane R. Hoag and Florence L. Nelson, and the court having heard argument and listened to counsel, finds that on the 23rd day of December, 1912, the claim of Jane R. Hoag was allowed for $150.00, and the claim of Florence L. Nelson was allowed for $330.00; that both of said claims were admitted and consented to by Gust W. Hoag, administrator of said estate; that on the 29th day of March, 1914, the order allowing said claims was vacated and set aside, and the claims were re-set for hearing for April 22nd, 1914; that on April 22nd said claims were dismissed, and appeal prayed to the Circuit Court of Cook County; that on the 28th day of April, A. D. 1914, the order of April 22nd, 1914, dismissing said claims was vacated; that on the 27th day of May, 1914, the motion of the administrator to vacate the order of March 29th, 1914, was denied, and the claims set for June 30th, 1914; that on May 25th, 1915, the motion of Administrator to vacate orders entered March 29th, 1914, and May 27th, 1914, was denied; that on May 28th, 1915, leave was given to Emil J. Hoag and Charles B. Hoag to supply lost claims, and copies of claims were filed by them, and the hearing on said claims were set for June 29th, 1915; that on said last date the claimants presented no evidence in support of their claims, but contended that the court had no power, or authority, and was without jurisdiction to vacate the allowance of said claims, heretofore made and re-set the same for hearing, which said contention of claimants the court overruled and dismissed said claims.
>
> It is therefore ordered, adjudged and decreed, that the said claims of Jane R. Hoag for $150.00 filed in this court on the 4th day of December, A.D. 1912, be and the same is hereby dismissed out of this court; and it is further ordered that the claim of Florence L. Nelson Daniels be and the same is hereby dismissed out of this court; to the entry of which order, as to each claim, said claimants and Gust W. Hoag, administrator herein, except and pray an appeal

to the Circuit Court of Cook County, which appeal is granted on filing bond in each claim in the sum of $100.00, said bond to be filed within twenty days from this date."

The matter was then appealed to the Circuit Court.

On April 22, 1918, the matter came up on appeal in the Circuit Court. Counsel for the claimants objected to consideration of the two claims on the ground of want of jurisdiction, the claims having been allowed by the Probate Court on December 23, 1912, and no objection being made to the order of allowance until more than fourteen terms after the expiration of the term at which they were allowed. No evidence being offered, the Circuit Court, upon claimants' motion to have judgment entered against the estate of Nada Moag, Deceased, for the amount of the respective claims of Jane M. Moag and Florence L. Nelson, ordered the motion overruled and denied. Subsequently, owing to a slight error in the order of April 22, 1918, that order was vacated and set aside and on May 16, 1918, a final order entered which was substantially the same as that of April 22, 1918. This appeal is taken from the final order of May 16, 1918.

The record shows that on February 16, 1914, the administrator filed his final account and report in which he claimed credit for payment of the two claims; that on March 18, 1914, the appellees filed their written objections to the allowance of the claims, which objections were sworn to, and charged in substance that the claims were allowed by collusion and fraud between the claimants and the administrator without hearing by the Probate court and without notice to the objectors. In the written ob-

jections the appellees charged that the claims should not have been allowed but should have been denied and prayed that the orders allowing them should be vacated and set aside and that the claims be dismissed. Six days later, on March 24, 1914, the administrator filed his answer to the appellees written objections, which counsel for the Appellants refers to as in the nature of a plea to the jurisdiction of the court. Their answer does not deny the matters of fact stated in the objections but alleges that the allowance of the claims constituted judgments against the estate and that as they had been paid by the administrator and as 14 terms had elapsed since the claims were allowed, the Probate Court was without jurisdiction to vacate said orders of allowance except for fraud or mistake, and that in said objections there was no allegation of facts showing fraud or mistake.

There is no doubt but that the Probate court, owing to its inherent equitable jurisdiction, had the right at a subsequent term to set aside for fraud and mistake its prior order of December 3, 1912; and, in the absence of proof to the contrary, the presumption is that the Probate court in entering its order of March 29, 1914, had jurisdiction of the parties and acted upon sufficient evidence. It is asserted by counsel for the appellants that the order of the Probate court entered March 29, 1914, setting aside the order of December 3, 1912, was entered without any evidence tending to prove fraud, accident or mistake. There is nothing, however, in the record which supports that assertion.

Further, the final order of the Probate Court entered July 16, 1915, formally dismissing the claims, and from which order the appellants took the appeal to the Circuit Court, shows that they made no contention in the Probate court that that court in vacating the order allowing the claims had acted without evidence proving or tending to prove fraud or mistake. The final order of the Probate court entered July 16, 1915, which formally dismissed the claims is as follows: "That on May 28, 1915,* * * the hearing on said claims was set for June 29, 1915; that on said last date, the claimants presented no evidence in support of their claims but contended that the court had no power or authority and was without jurisdiction to vacate the allowance of said claims heretofore made and reset the same for hearing, but said contention of claimants the court overruled and dismissed said claims." Evidently, the sole contention of the appellants in the Probate court on the hearing of the claims was that the court was without jurisdiction to enter the order vacating the order allowing the claims. Of course, lack of jurisdiction is not the same as the exercise of jurisdiction without evidence. It would seem, therefore, that counsel for appellants have sought to raise in the Circuit Court and in this court another and different question from that which arose in the Probate court.

When the appeal to the Circuit court came up for hearing on April 8, 1918, counsel for appellants claimed for the first time that the Probate court had entered its order of March 29, 1914, vacating the orders allowing said claims, without proof of any fraud or mistake in enter-

ing said orders. The trial judge, however, rules that the only question before him on the appeal was the trial of the claims themselves. The hearing was continued until April 22, 1918, and at that time counsel for the appellants asked for judgment on the ground that the Probate court on December 23, 1912, had adjudicated the two claims; that those judgments had not been appealed from nor legally set aside or vacated and that no objections had been made to the said judgments until March 13, 1914, fourteen terms after the expiration of the term at which said orders of allowance were entered; that the court had lost jurisdiction thereof.

It will be observed that that motion does not contain anything suggesting that the Probate court in entering its order of March 29, 1914, had acted without evidence of fraud or mistake. The tiral judge denied the claimants motion for judgment and called the claims for hearing. Counsel for appellants then announced that they stood on their motion for judgment on the record and claimed that the court did not have jurisdiction to hear the claims. Refusing to offer evidence in support of their claims, the court dismissed the appeals and the matter came to this court.

In the absence of proof to the contrary the law will presume that the Probate court in entering its order of March 29, 1914, acted legally and upon sufficient evidence. Fish v. Glover, 154 Ill. 86. Whether or not the order of March 29, 1914, vacating the order allowing the claims was entered without any evidence whatever tending to prove fraud or mistake is a question which the record in no way

answers; as there has not been preserved what purports to be the evidence, if any, taken in the Probate court upon the entering of the motion to vacate. "The Appellate Court can know nothing of what occurred in the court below except as recited in the record." Kingan v. Estate of Burns, 104 Ill. App. 661.

The appellants have had two opportunities, one in the Probate court, and one in the Circuit court, to establish their claims by competent evidence. Apparently they have not seen fit to avail themselves of these opportunities. When the claims came up for hearing in the Probate court on June 29, 1915, it was the right and obligation of the appellants to put in proof as to their claims. Likewise, when the claims came up for hearing in the Circuit court they had a similar opportunity, but they refused to put in proof. Under the circumstances, we are of the opinion that the judgments of the Probate court and the Circuit court in dismissal of the claims were entirely proper.

Finding no error in the record the judgments are affirmed.

AFFIRMED.

481 - 24835

THE FLANAGAN & BIEDENWEG COMPANY, a corporation,

Appellees,

vs.

HENRY W. McGUIRE and EDWARD HUDSON,

Appellants.

APPEAL FROM COUNTY COURT, COOK COUNTY.

216 I.A. 651

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, The Flanagan & Biedenweg Company, brought suit against the defendants for the cost of the manufacture and erection of a stained glass window, and recovered judgment in the sum of $1,000.00. It is the theory of the plaintiff that through its agent, one James G. Flanagan, it entered into negotiations with the defendants, McGuire and Hudson, which resulted in the plaintiff being employed to manufacture and erect a stained glass window for $1,000.00; that the window was subsequently manufactured and installed, but that the defendants then refused to pay the cost, claiming that they never became liable therefor. On the other hand it is the theory of the defendants that they neither ordered the stained glass window nor was it properly made.

The evidence is voluminous and conflicting and the chief question involved is one of credibility. The evidence was submitted to the jury, and unless its verdict is manifestly against the weight of the evidence we are not authorized to disturb it. The plaintiff's claim

rests chiefly on the testimony of James G. Flanagan, together with certain letters and alleged admissions, of Father H. W. McGuire and Hudson and their conduct during the time the window was being manufactured and installed. The evidence suggests that subsequently to the death of one Father Hugh McGuire, an effort was made among his parishioners, being those of the parish of St. James Roman Catholic Church, Wabash avenue and 29th street, to collect money in order to build, in his memory, a monument in Calvary, and, also, to place in the church a stained glass window, and that a committee was appointed for that purpose. The defendant, Hudson, admits that he was one of the members of such committee and that he received and collected some money to carry out its purpose.

One James G. Flanagan of the plaintiff company, testified that he was a member of the St. James Church, and, learning that there was a fund being collected for a memorial, part of which was to be a stained glass window, he went to Father H. W. McGuire and solicited the order for the stained glass window; that Father McGuire said he was glad to know there was someone in his congregation capable of doing it; that he would give him the order if he could show him that the plaintiff could do the work; that Father McGuire referred him to Hudson; that he then went to Hudson and had a conversation with him in which Hudson said he would be glad to favor the plaintiff with the business and hoped that the plaintiff would be successful with it; that he presented to Hudson a letter, stating that the cost would be $1,000.00. On January 9, 1912, the plaintiff wrote to Hudson that he was pleased to advise him that

Father McGuire had commissioned the plaintiff to build a memorial window and thanked him and Father McGuire for their confidence in the plaintiff and assured them of "earnest efforts to make a most creditable window". Subsequently, according to the testimony of Flanagan, he told Father McGuire that it was agreeable to Hudson that the plaintiff should make the window and that Father McGuire, who meanwhile had the design in his possession, gave it to him and said to proceed with the window; that he was glad he could give the order to the plaintiff; that it was arranged that Father McGuire should visit the plaintiff's studio and inspect the window when it was finished; that the price was stated as $1,000.00; that the window was to be made of the same quality of glass that was used in what was known as The Crucifixion window; that when the window was so far finished as to be ready for glazing Father McGuire saw it at the artist's studio and expressed his satisfaction; that the window subsequently was installed, and that, at that time, in the presence of a number of others, Father McGuire said it was a beautiful window and he liked it better than the crucifixion window.

On cross examination he stated that Father McGuire told him to make an estimate and call on Hudson; that Hudson told him that Father McGuire, Edward Hudson and one Keyes were a committee to deal with the matter. Further, on cross examination, he testified that on January 3, 1912, when he presented his letter Hudson said he was pleased to give the plaintiff the order to make the window; that he would vote as one of the committee to give the plaintiff the order; that

he would be pleased if the plaintiff had the order to make the window. He says he never knew or talked with Reyes.

One Brady, an artist who drew cartoons for the window and superintended the building of it from the design that he says was furnished by Father McGuire, testified by deposition that in a conversation between Father McGuire and others about two weeks or more after the plaintiff had received the contract, he stated that they were glad to give the contract to a Chicago house, and that at a later date at another conversation at the plaintiff's factory, when the stained glass window was put up on an easel in the plaintiff's factory, and a number of persons were present, Father McGuire said that he had one objection, that he thought one leaf in the center of the window in the vine was a little light and requested that it be changed to make it darker, which was done; that he also said he was well pleased with it and glad that he had given it to a Chicago house. One Webster stated that he was present at a conversation at which Father McGuire said, a few minutes after the window had been set up in the church on Friday or Saturday preceding Easter Sunday 1912, that the window was very superior to the one across the way.

The witness Schrosbree, a designer of glass for the plaintiff, stated that he was present at the installation of the window and heard Father McGuire, in the presence of quite a number of other persons, announce that he was very well pleased with the window and that it far surpassed the window across the hall; that a Miss Hopkins said at the same conversation in the presence of Father McGuire

that the window was beautiful and surpassed the one across the way, or words to that effect.

Joseph E. Flanagan testified that he had a talk with Father McGuire about two weeks before Easter Sunday; that he asked him how he liked the window and Father McGuire said, "You made a very fine job, now don't fail to get it in by Easter."

One Neinen, a glass setter of the plaintiff, testified that Father McGuire, after walking up and down before the window when it was at the plaintiff's shop, said to Flanagan, "You have got a beautiful window, I like it very much, and I am pleased that I gave it to a Chicago concern." Also that on Saturday before Easter Sunday when the window was being put in place he heard Father McGuire state to Flanagan, "You have a beautiful window there. You have the one across the way beat a thousand ways, and it is very superior to what I expected."

The witness Grunberg, an art glass cutter, an employee of the plaintiff, who cut part of the glass for the memorial window, testified that he heard Father McGuire say at the plaintiff's shop, in the presence of a number of other persons, that the window was fine and it looked beautiful with the exception of one leaf; that that leaf was then taken out and a new piece of glass was then cut to fit the pattern and Father McGuire said that that was all right.

On behalf of the defendant, Edward Hudson testified that a meeting was called early in September, 1911, at which many of the parishioners were present; that it

was called by Father McGuire or Father Kearns as the result of an announcement from the pulpit; that he, Hudson, started the subscription with $250.00 for the monument to Father Hugh McGuire; that no committee was appointed. He denied the conversation stated to have taken place between him and James G. Flanagan and denied that Flanagan delivered him the letter of January 3, 1912, but states that it was sent to him by mail. He further denied the first conversation which Flanagan testified to as having taken place with him and stated that the first time he ever met Flanagan was in 1912, two days after the window was installed. He testified further that after it was installed he heard Flanagan say that the window was not right and that he would have it removed and made good; that Father McGuire said to Flanagan that the window was not right and that they could not afford to keep it in the church, to which Flanagan responded, "Father, don't worry, we will have it made all right"; that it was taken out in the course of a few days; that subsequently it was put back; that he never talked with either of the Flanagans or with Grady about the second window; that the second window was much darker than the first.

A witness, Flood, testified that he heard a conversation on Easter Sunday, 1912, at St. James church between Father McGuire, Father Kearns and James Flanagan at which Father McGuire said that the window would have to come out; that Flanagan said that he would take it out and make it satisfactory to all concerned.

The witness, Father H. W. McGuire, testified

that he was present at a meeting of the congregation of St. James parish in February, 1911, held in St. James school hall; that there were about 600 persons present; that Father Kearns was chairman; that Father Kearns stated that the object of the meeting was to consider ways and means of erecting a suitable monument to Father Hugh McGuire; that the meeting lasted from a half to three quarters of an hour; that no committees were talked about or were appointed at that time; that Hudson was at that meeting; that no other meeting in relation to the monument or memorial window or the memorial book was ever held; that at the meeting envelopes were passed around for the people to put their offerings in for the purpose of securing a monument to be erected in Calvary cemetery; that nothing was said in the announcement about building a window or printing a book, and a collection was taken up in the church the following Sunday and envelopes distributed for the convenience of the people; that James Flanagan was first introduced to him by Father Kearns; that Flanagan said that he understood he contemplated the erection of a memorial window to Father Hugh McGuire and that he wanted to get the work; that he told Flanagan that they did not contemplate putting in a window and that they had no money for its erection; that they had hardly enough money to erect a monument; that in a subsequent conversation Flanagan asked him if he could make a design for a window to be installed as a memorial and he told him that they had no intention of having a window made at that time, and, further, that he had a design already made by Tiffany of New York; that at another conversation Flanagan asked him if he could take a certain design; that he told him it was the property of St. James

church and as they did not contemplate having a window put in he could not have it; that on another occasion he told him that they had no intention of installing a window at that time; that in December, 1911, he had another conversation in which Flanagan asked if he could see the design and that he told him he could see it; that it was in a closet in the rectory; that Flanagan told him he would like to have the work whenever they had anything of that kind done; that he told him there was no intention of installing a window; that he had another conversation on January 3, 1912; that Flanagan said he understood he had sufficient money to erect a memorial window; that he told him he was mistaken if he thought we had collected $1,000.00; that in another conversation on the same day, in the afternoon, Flanagan told him that Edward Hudson had given him the contract for the erection of a memorial window and then asked him to give him the design so that he might start to work; that he handed him the letter of January 3, 1912, and asked him to read it stating that it was a copy of the contract for the window; that he read it and handed it back; that he then asked for the design and he gave it to him; that about six weeks later he was asked to go to the plaintiff's place of business and he said he would go; that he went over and met Joseph Flanagan, Brady, the artist, and another man; that he was shown different kinds of glass but was not shown any parts of the window; that Flanagan said that they had not started on the work then; that subsequently on another occasion, about March 17, 1912, with Father Kearns, he went to the factory and had a conversation with James and Joseph Flanagan, Brady and some others; that he saw the window on the easel; that

he told them the coloring was wrong and referred to the design; that Father Kearns said he did not like the left panel; that he and Father Kearns both remarked that it was too green in certain parts; that Brady said all those things would be changed when the window was completed; that certain spots in the design had been changed from brownish gold to green; that Brady said when it was finished it would look exactly like the design; that on the same day he had a conversation with Joseph Flanagan in which he told him that his man would have "to get busy if they wanted to have that window ready for Easter Sunday"; that when the window was put in he made certain criticisms of it and Flanagan said that they would remove it and make it good; that the window was taken out by the plaintiff and remained out about three weeks and was then brought back and put in again; that he then had a conversation with James Flanagan and told him that the last window was worse than the first; that Flanagan said it was the best window in the church; that the second window was a dark smoky hue with the exception of the tracery.

The evidence shows that it was admitted that Father McGuire entered into a contract on May 17, 1912, for the construction of a window, the one that is now in the church, and that he submitted for that purpose the design in question, and that the window was built after that design and so installed in the church; that it was built by the Church Glass and Decorating Company of New York and installed in August, 1912; that the plaintiff's window was in the basement of the school. Father McGuire further testified that he told Flanagan that he would have to remove

the window; that it could not stay in the church; that if he did not they would be forced to remove it. He denied ever having said that the window installed by the plaintiff was well done or satisfactory. On cross examination, when asked if he said there was a sum set apart for a memorial window, he testified that he did not remember that he did but that he would not say that he did not, and, further, he admitted that he made no objection to the plaintiff going on with the work of installing the window. He also admits that he did say that he was glad the contract was given to a Chicago house.

The cause was tried before a jury and a verdict rendered and a judgment entered in the sum of $1,000.00 in favor of the plaintiff and against the defendants, McGuire and Hudson.

At the close of the plaintiff's evidence, a motion was made by counsel for the defendants, that the jury be instructed to find the issues for the defendant, Frank J. Keyes, and for judgment on the verdict. The record shows the following: "And thereupon on June 18, 1918, the court pronounced judgment on the verdict in favor of Frank J. Keyes.

At the close of the case and after the jury had brought in their verdict in favor of the plaintiff for $1,000.00 and motions had been made to vacate and set aside the verdict and for a new trial, counsel for the plaintiff asked leave to amend the declaration by striking out or discontinuing as to the first count "also, by striking out the name of Frank J. Keyes, where-

ever it appears, wherever the same appears in the said declaration."

Counsel for the defendant admitted that the first count might be stricken out but objected to the striking out of the name of Frank J. Keyes, whereupon the trial judge overruled the plaintiff's motion.

It is contended by the defendant that no contract was made between the defendants McGuire and Hudson and the plaintiff. The jury by their verdict evidently concluded that there was an obligation on the defendants to pay the $1,000.00 for the manufacture and erection of the window. Upon this appeal the question arises, does the evidence justify that conclusion of the jury. The critical question is one of credibility. If the testimony of the witness, James G. Flanagan is believed then the jury were justified in concluding that a contract was made and, further, if it believed, not only his testimony, but that of Brady, Webster, Joseph E. Flanagan, Nelson and Gruenberg, there was ample evidence to justify the verdict. Hudson testified that he was one of the committee having in charge the procuring of the memorial; also that he received some of the contributions, collected some of the money, paid some of the bills and paid out money on the architect's order. When asked if he were treasurer of the committee he answered; well I was handed some of the money, there were others that collected. The evidence shows that there was some 600 to 800 interested in the memorial, that is, the monument, window and a certain memorial book.

Hudson testified further that they were to put in the window if they collected enough money. The original meeting was called so as to get as many subscriptions as possible. Of course, those who subscribed merely bound themselves to that extent and no further, but as to the defendants, McGuire and Hudson, it is obvious, assuming the testimony of the plaintiff's witnesses to be true, that in their dealings with the plaintiff they held themselves accountable as undertaking to conduct the whole affair, relying upon contributions and subscriptions to meet the cost. Obviously the plaintiff relied upon the defendants, McGuire and Hudson.

We are of the opinion that there was sufficient evidence to justify the jury in concluding that the plaintiff gave credit to Hudson and McGuire and that they recognized it as having authority to make the window. In Fredendall v. Taylor, et al 23 Wisc. 538, the following language is used: "It is conceded that the State Firemen's Association was not incorporated at this time, it had no legal existence so that it could contract or be sued as such. And where such is the case, a committee which assumes to contract for services for such an irresponsible, intangible association, must become personally liable, else there is no liability whatever. One professing to act as agent if he does not bind his principal binds himself. Dennison v. Austin, 15 Wis. 334. And it can make no difference that the reason why he does not bind his principal is because the principal for whom he professes to act has no existence

It is quite obvious from the testimony of the defendant, McGuire ,that he considers the plaintiff as having been employed to manufacture and install the window. The only substantial defense his testimony suggests is that the window was not made in a good and workmanlike way and in accordance with the design. The evidence, however, on the latter subject, was presented to the jury and though conflicting, they have passed upon it favorably to the plaintiff and we do not feel justified in holding otherwise.

The only other question of importance in the case is that which arises concerning the motions that were made as to the defendant Frank J. Keyes. We are of the opinion that the recitation in the record, "And thereupon on June 18, 1918, the court pronounced judgment on the verdict in favor of Frank J. Keyes" does not constitute a sufficiently formal judgment. Myer v. Village of Teutopolis, 131 Ill.552; Metzer v. Goodbridge, 183 Ill. 174; Harvey v. Cochran, 103 Ill. App. 576. In Van Grundy v. Hill, 262 Ill. 162, the court said: "While it is true that no particular phrase or words are necessary still a valid judgment must at least show a party who recovers, a party against whom a recovery is had and the thing or amount of money recovered." Then too, counsel for the plaintiff invited the error which he now complains of. It is the law that he who successfully moves the court to enter an inapt interlocutory judgment will not be permitted to take advantage of the error. He is estopped. As said in Borden v. Croak, 131 Ill. 68: "A judgment will never be reversed for errors committed at the instance or in favor of the party seeking the reversal." 3 Cyc. 242.

We have examined the other points made in the brief of counsel for the defendants but find them all untenable.

There being no error in the record the judgment is affirmed.

AFFIRMED.

335 - 24686

THE CESKA RIMSKA KATOLICKA VSTREDNI JEDNOTA ZEN VE SPOJENYCH STATECH AMERICKYCH, a corporation,

vs.

JAN PERKAUS,

Appellant,

and WILLIAM HUBKA,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

216 I.A. 651

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant corporation is a fraternal benefit society. One Anezka Perkaus, wife of appellant Jan Perkaus, was a member of the society at the time of her death. She was possessed of a death benefit certificate issued by the society in the sum of $1,000.00. She had originally (October, 1912) designated her husband as her beneficiary but she later (March 28, 1914) executed a new designation of beneficiary on a form provided by the complainant society and the latter issued its certificate in accordance with such latter designation on April 8, 1914 and on the 29th of that month Mrs. Perkaus died, leaving as her only heirs, her husband the appellant and her son John Perkaus, an in-

fant nine months old. The latter died the day after his mother died.

In the designation of beneficiary executed by Mrs. Perkaus on March 28, 1914, she directed that the proceeds of her benefit certificate should be disposed of as follows:

"To my husband Jan Perkaus $5.00. To my son John Perkaus, $595.00. I appoint my brother Vilem (William) Hubka as guardian of my son. In case my son should die then I bequeath the $595.00 to my brother Vilem Hubka inasmuch as he supports me in everything. To myself for my funeral I bequeath $400.00."

Upon her death and the death of her son, both the husband and the brother of the deceased claimed the proceeds of her death benefit certificate, and the complainant society filed its bill of interpleader, making the two claimants of the fund parties defendant and offering to pay the $1,000.00 to the clerk of the court. By consent, an interlocutory decree was entered under which the $1,000.00 was turned over to the clerk of the court and the clerk was directed to pay the complainant society $85.00, of which $75.00 was for solicitor's fees and $10.00 was for expenses incurred as court costs, leaving $915.00 in the hands of the clerk.

Appellee William Hubka filed an answer in which he admitted that upon her death, his sister left as her only heirs, Jan Perkaus, her husband, and John Perkaus, her son, and that a day or two later the son died leaving

the father, Jan Perkaus, as his only heir and he further admitted that his sister executed the designation of beneficiaries set forth in the bill of complaint. He alleged that it was the intention of the deceased that her husband should not receive more than $5.00 from the proceeds of her benefit certificate and that $595.00 should be paid to him, the said Hubka, in case of the death of the son of the beneficiary.

The appellee Hubka further set forth in his answer that he, by reason of appellants refusal to pay therefor, had paid for necessaries and family expenses of the deceased, including doctor's bill, hospital bill, nurse's bill, part of funeral expenses, rent, clothing, food and assessments of complainant society, in the aggregate sum of $374.29; that these expenses were usual, customary and reasonable; that the undertaker's bill remained unpaid; that appellant is financially irresponsible and insolvent and has not means out of which appellee could satisfy his claim as above set forth, except from such part, if any, of the $1,000.00 fund which might be awarded to appellant.

Appellants filed eight exceptions to the answer filed by appellee, all but two of which were sustained.

By its decree, the court found that upon her death deceased left as her only heirs, her husband, the appellant, and her son; that after her death, her son died leaving appellant as his only heir; that the deceased executed a designation of beneficiary which is set forth in the decree in the Bohemian language in which

it was executed, and its English translation is also set forth in the decree.

The decree further was to the effect that the $595.00 should be paid to the administrator of the estate of Jan Perkaus Jr., deceased; that the $400 for the funeral of Anezka Perkaus should be paid to the administrator of the estate of Anezka Perkaus, deceased, and that the $85 allowed the complainant society should be borne by the parties in interest proportionately, "and that the money ($915) should be divided as follows: $458 to Jan Perkaus, $544.42 to the administrator of Jan Perkaus Jr., deceased, and $366 to the administrator of Anezka Perkaus, deceased."

Both the husband, Jan Perkaus, and the brother, William Hubka, have appealed from the decree.

It is the contention of the husband, Jan Perkaus, that the whole amount should have been awarded to him; that this should be done by reason of the fact that deceased had designated him as her beneficiary and her subsequent designation was void inasmuch as the previous certificate was not surrendered to the society and cancelled as provided by its by-laws; that it should be done even under the last certificate and designation of beneficiary,- as to the $544.42, because he is the only heir of his son and, as the latter was an infant of nine months when he died, administration of the estate will be a useless thing; and as to the $366, because the designation by deceased that $400 was to be for her funeral expenses was void and contrary to the provisions of the statute under which the com-

plainant society was organized and its benefit certificate issued and being thus void, the court should have directed that it be paid, not to the estate of deceased but to her heirs (her husband and son) and as the son has died leaving appellant as his only heir, the court should have directed that said sum be paid to appellant.

It is the contention of the brother, William Hubka, that the court should have directed that the $544.42 be paid to him on the theory that it was the apparent intention of the deceased that this sum was to go to the son and (inasmuch as she attempted in her designation, to appoint him (Hubka) her son's guardian) in case of his death before he reached majority, it should go to her brother and he further contends that whatever interest the appellant Jan Perkaus was found to have in the item of $366 should have been subjected to his claim to be reimbursed for the necessaries he had furnished deceased and her child under the circumstances set forth in his answer.

Appellant first contends that the decree must be reversed because it contains certain sentences in the Bohemian language and therefore violates the provision of the Constitution to the effect that all judicial proceedings shall be conducted, preserved and published in no other than the English language. This contention is not tenable. The documents in question were all in the Bohemian language. The decree made certain quotations from these documents in the Bohemian language and set forth their translation in the English language, the correctness of which is not questioned. This in no way affected the validity

of the decree.

Likewise the court did not err in holding that the benefit certificate in which the husband, Jan Perkaus, had been designated as beneficiary, had been superseded by the one executed by deceased shortly prior to her death although the society had issued its certificate on the last designation without a surrender of the prior certificate, as required by its rules. As was said by this court in Ptacek v. Pisa, 134 Ill. App. 155, quoting from Niblack on Benefit Societies and Accident Insurance. (2nd Ed.) sec. 222; "A member and the society may, during the life of the member, waive these requirements (that old certificate be surrendered before a new one is issued) and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties."

The designation of the deceased that "in case my son should die then I bequeath the $595 to my brother Vilem Hubka" must be held to refer to the possible death of her son before her death. It must be remembered that this was a designation of beneficiary under a death benefit certificate issued by a mutual benefit society. It was not a will. While, as appellee contends, the rules of construction applied to a will are sometimes applied to such documents as the one involved here, that rule cannot be carried to the extent of making a will out of a document which is something else. Under this designation of beneficiary, the complainant society became obligated to pay the beneficiaries designated as they existed upon the date of the death of the member making the designation. Therefore the court correctly order-

ed as to the item of $544.42, that it be paid to the administrator of the estate of the son John Perkaus, Jr. The fact that appellant is admitted to be his son's only heir cannot change the situation so far as this item is concerned. There are some claims that might properly be allowed under certain circumstances, against an estate of an infant, even of the age of only a few months, and the court in this proceeding cannot know that there are none such nor could that question be considered in this case. After this money is paid to a designated beneficiary, it is subject to payment of any claims there may be against the latter, although it is not so subject before it is paid. J. & A. Ill. Sts. ch. 73 sec. 6656; Martin v. Martin, 187 Ill. 200; Hamilton v. Darley, 188 Ill. App. 229; 266 Ill. 542.

Nor did the court err in ordering that the $400 item ($366.00) be paid to the administrator of the estate of the assured. The contention of appellant as to this item, to the effect that the statute prohibits the making of the proceeds of such a benefit certificate as is here involved, liable for such debts as may be proved against the estate of the insured, cannot prevail. The section of the statutes above referred to provides that "the money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to do business under this Act, shall not be liable to attachment by trustee, garnishee or other process, and shall not be siezed, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder or of any beneficiary named in a certi-

ficate, or of any person who may have any right thereunder." This section of the statute is not designated to protect the benefit certificate, or the proceeds thereof, from the voluntary act of the insured or the beneficiary therein named, but to prevent such certificate, or the proceeds thereof, from being subjected by creditors to the payment of debts against the will of such member or beneficiary. McGrew v. McGrew, 190 Ill. 604; Jarvis v. Binkley, 206 Ill. 541.

The contention of appellee that whatever interest Jan Perkaus may be found to have in the proceeds of this benefit certificate should be subjected to his claim to be reimbursed for the necessaries he had furnished deceased and her child, is one which we need not consider as the trial court correctly found that Jan Perkaus was entitled to no direct interest in the proceeds of the certificate, beyond the item of $5.00 which the insured directed should be paid to him, against which item appellee makes no claim.

Finding no error in the record, the decree of the Superior Court is affirmed.

AFFIRMED.

335 - 24686

THE CESKA RIMSKA KATOLICKA VSTREDNI JEDNOTA ZEN VE SPOJENYCH STATECH AMERICKYCH, a corporation,	216 I.A. 651
vs.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
JAN PERKAUS, Appellant,	
and WILLIAM HUBKA, Appellee.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant corporation is a fraternal benefit society. One Anezka Perkaus, wife of appellant Jan Perkaus, was a member of the society at the time of her death. She was possessed of a death benefit certificate issued by the society in the sum of $1,000.00. She had originally (October, 1912) designated her husband as her beneficiary but she later (March 23, 1914) executed a new designation of beneficiary on a form provided by the complainant society and the latter issued its certificate in accordance with such latter designation on April 8, 1914 and on the 29th of that month Mrs. Perkaus died, leaving as her only heirs, her husband, the appellant, and her son John Perkaus, an in-

fant nine months old. The latter died the day after his mother died.

In the designation of beneficiary executed by Mrs. Perkaus on March 28, 1914, she directed that the proceeds of her benefit certificate should be disposed of as follows:

"To my husband Jan Perkaus $5.00. To my son John Perkaus, $595.00. I appoint my brother Vilem (William) Hubka as guardian of my son. In case my son should die then I bequeath the $595.00 to my brother Vilem Hubka inasmuch as he supports me in everything. To myself for my funeral I bequeath $400.00."

Upon her death and the death of her son, both the husband and the brother of the deceased claimed the proceeds of her death benefit certificate, and the complainant society filed its bill of interpleader, making the two claimants of the fund parties defendant and offering to pay the $1,000.00 to the clerk of the court. By consent, an interlocutory decree was entered under which the $1,000.00 was turned over to the clerk of the court and the clerk was directed to pay the complainant society $85.00, of which $75.00 was for solicitor's fees and $10.00 was for expenses incurred as court costs, leaving $915.00 in the hands of the clerk.

Appellee William Hubka filed an answer in which he admitted that upon her death, his sister left as her only heirs, Jan Perkaus, her husband, and John Perkaus, her son, and that a day or two later the son died leaving

the father, Jan Perkaus, as his only heir and he further admitted that his sister executed the designation of beneficiaries set forth in the bill of complaint. He alleged that it was the intention of the deceased that her husband should not receive more than $5.00 from the proceeds of her benefit certificate and that $595.00 should be paid to him, the said Hubka, in case of the death of the son of the beneficiary.

The appellee Hubka further set forth in his answer that he, by reason of appellants refusal to pay therefor, had paid for necessaries and family expenses of the deceased, including doctor's bill, hospital bill, nurse's bill, part of funeral expenses, rent, clothing, food and assessments of complainant society, in the aggregate sum of $374.29; that these expenses were usual, customary and reasonable; that the undertaker's bill remained unpaid; that appellant is financially irresponsible and insolvent and has not means out of which appellee could satisfy his claim as above set forth, except from such part, if any, of the $1,000.00 fund which might be awarded to appellant.

Appellants filed eight exceptions to the answer filed by appellee, all but two of which were sustained.

By its decree, the court found that upon her death deceased left as her only heirs, her husband, the appellant, and her son; that after her death, her son died leaving appellant as his only heir; that the deceased executed a designation of beneficiary which is set forth in the decree in the Bohemian language in which

it was executed, and its English translation is also set forth in the decree.

The decree further was to the effect that the $595.00 should be paid to the administrator of the estate of Jan Perkaus Jr., deceased; that the $400 for the funeral of Anezka Perkaus should be paid to the administrator of the estate of Anezka Perkaus, deceased, and that the $85 allowed the complainant society should be borne by the parties in interest proportionately, "and that the money ($915) should be divided as follows: $458 to Jan Perkaus, $544.42 to the administrator of Jan Perkaus Jr., deceased, and $366 to the administrator of Anezka Perkaus, deceased."

Both the husband, Jan Perkaus, and the brother, William Rubka, have appealed from the decree.

It is the contention of the husband, Jan Perkaus, that the whole amount should have been awarded to him; that this should be done by r ason of the fact that deceased had designated him as her beneficiary and her subsequent designation was void inasmuch as the previous certificate was not surrendered to the society and cancelled as provided by its by-laws; that it should be done even under the last certificate and designation of beneficiary,- as to the $544.42, because he is the only heir of his son and, as the latter was an infant of nine months when he died, administration of the estate will be a useless thing; and as to the $366, because the designation by deceased that $400 was to be for her funeral expenses was void and contrary to the provisions of the statute under which the com-

plainant society was organized and its benefit certificate issued and being thus void, the court should have directed that it be paid, not to the estate of deceased but to her heirs (her husband and son) and as the son has died leaving appellant as his only heir, the court should have directed that said sum be paid to appellant.

It is the contention of the brother, William Hubka, that the court should have directed that the $544.42 be paid to him on the theory that it was the apparent intention of the deceased that this sum was to go to the son and (inasmuch as she attempted in her designation, to appoint him (Hubka) her son's guardian) in case of his death before he reached majority, it should go to her brother and he further contends that whatever interest the appellant Jan Perkaus was found to have in the item of $366 should have been subjected to his claim to be reimbursed for the necessaries he had furnished deceased and her child under the circumstances set forth in his answer.

Appellant first contends that the decree must be reversed because it contains certain sentences in the Bohemian language and therefore violates the provision of the Constitution to the effect that all judicial proceedings shall be conducted, preserved and published in no other than the English language. This contention is not tenable. The documents in question were all in the Bohemian language. The decree made certain quotations from these documents in the Bohemian language and set forth their translation in the English language, the correctness of which is not questioned. This in no way affected the validity

of the decree.

Likewise the court did not err in holding that the benefit certificate in which the husband, Jan Perkaus, had been designated as beneficiary, had been superseded by the one executed by deceased shortly prior to her death although the society had issued its certificate on the last designation without a surrender of the prior certificate, as required by its rules. As was said by this court in Ptacek v. Pisa, 134 Ill. App. 155, quoting from Niblack on Benefit Societies and Accident Insurance. (2nd Ed.) sec. 222; "A member and the society may, during the life of the member, waive these requirements (that old certificate be surrendered before a new one is issued) and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties."

The designation of the deceased that "in case my son should die then I bequeath the $595 to my brother Vilem Hubka" must be held to refer to the possible death of her son before her death. It must be remembered that this was a designation of beneficiary under a death benefit certificate issued by a mutual benefit society. It was not a will. While, as appellee contends, the rules of construction applied to a will are sometimes applied to such documents as the one involved here, that rule cannot be carried to the extent of making a will out of a document which is something else. Under this designation of beneficiary, the complainant society became obligated to pay the beneficiaries designated as they existed upon the date of the death of the member making the designation. Therefore the court correctly order-

ed as to the item of $544.42, that it be paid to the administrator of the estate of the son John Perkaus, Jr. The fact that appellant is admitted to be his son's only heir cannot change the situation so far as this item is concerned. There are some claims that might properly be allowed under certain circumstances, against an estate of an infant, even of the age of only a few months, and the court in this proceeding cannot know that there are none such nor could that question be considered in this case. After this money is paid to a designated beneficiary, it is subject to payment of any claims there may be against the latter, although it is not so subject before it is paid. J. & A. Ill. Sts. ch. 73 sec. 6656; Martin v. Martin, 187 Ill. 266; Hamilton v. Darley, 188 Ill. App. 229; 266 Ill. 542.

Nor did the court err in ordering that the $400 item ($366.00) be paid to the administrator of the estate of the assured. The contention of appellant as to this item, to the effect that the statute prohibits the making of the proceeds of such a benefit certificate as is here involved, liable for such debts as may be proved against the estate of the insured, cannot prevail. The section of the statutes above referred to provides that "the money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to do business under this Act, shall not be liable to attachment by trustee, garnishee or other process, and shall not be siezed, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder or of any beneficiary named in a certi-

ficate, or of any person who may have any right thereunder." This section of the statute is not designated to protect the benefit certificate, or the proceeds thereof, from the voluntary act of the insured or the beneficiary therein named, but to prevent such certificate, or the proceeds thereof, from being subjected by creditors to the payment of debts against the will of such member or beneficiary. McGrew v. McGrew, 190 Ill. 602; Jarvis v. Binkley, 206 Ill. 541.

The decree entered by the trial court was not correct in finding "that the disposition of $400 for the funeral of Anezka Perkaus is illegal and void." This language was doubtless used inadvertently for, after making such finding, the decree gives this disposition by the assured full force and effect by directing that this money "should be paid to the administrator of the estate of Anezka Perkaus, deceased." The decree should have found that this disposition of $400 for funeral expenses was proper and that the money should be paid to the administrator of the estate of Anezka Perkaus, deceased, to be used for the purpose designated, the balance, if any, to be disposed of in due course of administration, it having then left the possession of the benefit society and thus was no longer subject to the provisions of the section of the statute referred to.

The contention of appellee that whatever interest Jan Perkaus may be found to have in the proceeds of this benefit certificate should be subjected to his claim to be reimbursed for the necessaries he had furnished deceased and her child, is one which we need not consider as

the trial court correctly found that Jan Perkaus was entitled to no direct interest in the proceeds of the certificate, beyond the item of $5.00 which the insured directed should be paid to him, against which item appellee makes no claim.

The decree of the Superior Court is modified as suggested and in all other respects is affirmed.

DECREE MODIFIED AND AFFIRMED.

Term No. 19. Agenda No. 43.

In The

APPELLATE COURT OF ILLINOIS. 216 I.A. 652

Fourth District.

October Term 1919.

R. W. McKINNEY, doing business as Paducah Vinegar Works, Appellee vs MIDWEST PRODUCTS COMPANY, Appellant.	Appeal from Circuit Court Marion County.

Opinion by Boggs, P. J.

An action in assumpsit was brought by appellee in the Circuit Court of Marion County against appellant to recover damages for breach of an alleged contract for delivery of 800 barrels of cider resulting in a verdict and judgment in favor of appellee for $2500. To reverse said judgment this appeal is prosecuted.

The declaration consisted of two special counts and the consolidated common counts. To said declaration appellant filed a plea of the general issue, a plea of want of consideration and a third plea alleging that the contract was made in the State of Wisconsin and setting up the statute of frauds of that State.

The record discloses that appellee was engaged in the vinegar business at Paducah, Ky., and that appellant is a corporation, organized under the laws of the state of Wisconsin, having its principal office at the city of Milwaukee. Appellant was engaged in the manufacture of cider vinegar and other apple products and did an extensive business in the State of Illinois. The record further discloses that in September 1917, one T. J. Morgan was operating a cider mill at Centralia, Illinois, under the name of The Morgan Cider Co., or T. J. Morgan Cider Co. On September 23, 1917 appellee went to Centralia and after some negotiations bought of appellant thru a Mr. Peterman, its agent 200 barrels of cider at seven cents a gallon, f. o. b. Centralia.

The evidence further discloses that on September 20, 1917, Morgan sold his mill at Centralia to appellant and appellant was in fact the owner thereof at the time it made sale of the 200 barrels of cider to appellee, tho at the time appellant was not in possession of said mill.

Thereafter appellee went to Chicago and on September 24, 1917 wired T. J. Morgan as follows: "Wire me Chicago care Great Northern Hotel if your man will fill the four hundred bbls. with cider, advising his name and station so barrels can be ordered to him I leave here tonight so must have reply immediately." signed, R. W. McKinney. Morgan wired McKinney on September 25, 1917 as follows: "Ship 200 or 1 car empty barrels Centralia 200 to Irvington Morgan Co. care of Dick Baldwin Contract accepted." signed T. J. Morgan. On the same day September 25, appellee wired Morgan at Centralia as follows: "If I can secure four hundred more bbls.

can you fill. Answer here immediately." signed R. W. McKinney. On the same day September 25th Morgan wired McKinney at Chicago, Illinois. "The order accepted ship the bbls to Centralia." signed T. J. Morgan.

After these telegrams had passed between appellee and Morgan, appellant began filling the orders for said cider. Some correspondence passed between appellee and appellant concerning the shipments, and on October 12, 1917, appellant wrote appellee as follows:

"Paducah Vinegar Works,
Paducah, Ky.
Gentlemen:

We have received today from our mill at Centralia, B-L for a car of 68 bbls. of cider. We are taking the liberty of drawing on you for this amount. Our people in Centralia inform us that they have contract with you for 800 bbls. at 7c plus $10.00 for loading of each car. This shipment of 68 bbls. being the first shipment on this contract.

We are enclosing invoice for $17.80 this being the freight charges on car of empty barrels received at Centralia last week.

The apples are coming in much faster than heretofore and shipments of cider will be made from now on.

Hoping that the above arrangements met with your approval, we beg to remain,

Very truly yours,
Midwest Products Co.,
By H. J. Nunnemacher."

P. S. We are also including the enclosed invoice charge of $10. for loading the car."

The record further discloses that quite a little correspondence took place between appellee and appellant relative to loading charges, amount of cider contained in barrels and with reference to adjustment of differences, etc. On October 16, 1917 appellant thru Peterman, its agent at Centralia, wired appellee that appellant was selling cider at 12 1-2 cents per gallon and to send no more empty barrels to be filled at 7c. Also addressing a letter to appellee to the same effect. Thereupon appellee wrote appellant at Centralia reminding the latter that appellee had a contract for 800 bbls. of cider at 7c f. o. b. Centralia and that barrels had been ordered shipped for appellant to fill. Appellant thru Peterman, its agent, replied by letter that appellant had no such contract or order with appellee. Thereupon appellee wired appellant at its home office at Milwaukee, Wis. that appellees contract with Morgan Cider Co. was for 800 bbls. cider at 7 c f. o. b. Centralia and requested appellant to wire if it had assumed the contract. Thereafter on Oct. 25, 1917, appellant sent appellee from its home office in Wisconsin the following telegram: "Paducah Vinegar Words, Paducah, Ky. Will fill Morgan Cider Company contract, also refund ten dollars loading charge and overage on guage shipments from now on will be correct. Please honor our drafts." signed, Midwest Products Company. And on the same day appellant sent appellee the following letter: "Paducah Vinegar Works, Paducah, Ky. Gentlemen: We have sent you telegram today as follows: 'Will fill Morgan Cider company contract, also refund ten dollars loading charge and overage on guage shipments from now on will be correct.

Please honor our drafts.' You will please pardon the delay of our answer to your telegram and letter, but we were waiting for advice from our Centralia plant. As we now understand the situation it was a verbal agreement in regard to the $10.00 loading charge and as you will note we have waived this claim. Our people are now guaging the cider as they load it, and you will find in the last two B-L the correct number of gallons. The average on these last two shipments is a trifle of 48 gallons per barrel. We will be glad to correct overcharge on the first shipment at this figure. Hoping that the present arrangement will be perfectly satisfactory, we beg to remain, Very truly yours, Midwest Products Co. by Henry J. Nunnemacher."

While there was considerable other correspondence between said parties it is not necessary to set the same forth for a large part of same had to do with other contracts contemplated between said parties, and has no material bearing on the issues in this case.

One of the contentions of appellant for a reversal of this case is that no valid binding contract was entered into between appellee and Morgan for the sale by Morgan as the Morgan Cider Co. to appellee of the eight hundred bbls. of cider in question. The contention of appellant being that the message sent by appellee to Morgan, at most requested to know if Morgan could fill certain orders for cider and not that appellee was making such orders and binding himself to pay therefor. Whether or not a binding contract was entered into between appellee and Morgan as Morgan Cider Co. the correspondence above referred to finally resulted in a definite contract by which appellant bound itself to sell to appellee 800 bbls. of cider at 7c per gallon and appellee become bound thereby to pay for the same. So in our view of the case there is nothing in this contention of appellant.

It is also contended by appellant that inasmuch as Morgan testified on the trial that he considered himself bound by the contract with appellee for the sale of the cider as above set forth, that therefore appellant could not be bound therefor. The basis of this contention as we understand appellant's argument is that before appellant could be bound on an assumption of the contract made with Morgan to furnish cider to appellee at the price of 7c per gallon that Morgan must have been relieved from that contract in consideration that appellant become bound. In other words, there must be a "novation." We do not agree with this contention of appellant for the reason that the correspondence shows that appellee was insisting that he had a valid binding contract with Morgan for the sale and delivery of the 800 bbls. of cider at 7c per gallon and the wire and letter of October 25th. sent by appellant to appellee definitely states that appellant undertook to fill the contract made with the Morgan Cider Co. which in effect made a valid and binding contract between appellee and appellant. Appellee having a right to demand the cider at the price agreed and appellant being in a position to enforce payment directly against appellee therefor as the cider was delivered. Wickham v. Bldg. & Loan Assn. 80 Ill. App. 523; Peters v. Raven, 159 Ill. App. 121; Holmes v. Suffrin, 198 Ill.. App. 45.

In Wickham v. Bldg. & Loan Assn. supra. the court at

page 528 says: "It is not, as appellants' counsel contend, necessary to the validity of the promise that the original debtor shall be discharged. Browne on Stat. of Frauds, 4th Ed. Sec. 194; Borschenius v. Canutson, 100 Ill. 82."

In Peters v. Raven, supra. the court at page 124 says: "Raven was interested in the business and primarily to protect his own interest promised to pay for any goods sold, delivered to, or repairs made for, Grage thereafter, it was an original undertaking and not merely a collateral promise to pay the debt of Grage, and it would not be necessary to its validity that Peters in selling the goods and making the repairs should have intended to hold Raven alone responsible for such goods and labor. A promise so made by Raven would be none the less an original undertaking because Grage also became indebted. Browne on Stat. of Frauds, 4th Ed., sec. 194; Borchsenius v. Canutson 100 Ill. 82; Wickham v. Hyde Park B. & L. Assn. 80 Ill. App. 523; Kee v. Cahill, 86 Ill. App. 561."

It is next contended by appellant that if a contract was entered into between it and appellee for the sale of the cider as contended, it was a contract made in the State of Wisconsin and therefore would be governed by the laws of that state and that the statute of frauds of the State of Wisconsin being pleaded, there can be no right of recovery. The statute of frauds of the State of Wisconsin is very similar to the Statute of frauds of the State of Illinois, and provides among other things that "every special promise to answer for the debt, default or mis-carriage of another person shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith."

We are of the opinion that this was a contract made in Illinois, to be performed in Illinois and would be governed by the laws of this state. The original contract made between appellee and Morgan, as the Morgan Cider Co. was made in the State of Illinois, and was for the delivery of cider in the State of Illinois. The telegrams and correspondence in the record are to the effect that appellant after having purchased the cider mill of the Morgan Cider Co. at Centralia, Illinois, assumed and obligated itself to fulfill the contract entered into by the Morgan Cider Company which was a contract to be performed in the State of Illinois.

In Benedict v. Dakin, 243 Ill. 384, the court at page 387 says; "The general rule is, that the place where a contract is made must govern the performance of its terms and conditions; but when it is the express intention of the parties that the contract is to be performed at a different place and under a different jurisdiction from the place where it is made, then the law of the place of performance must govern. (Mason v. Dousay, 35 Ill. 424) There is here, however, nothing, either in the terms of the contract or in the subject matter thereof, to indicate that the parties contemplated a performance of its terms at any place other than the place where the contract was entered into." We think the holding of the Supreme Court in the foregoing cases clearly show that the contract was not entered into in the State of Wisconsin. Even tho if it should be conceded that the contract was entered into in the State of Wisconsin, we think that the telegrams and letters offered in evidence and hereinabove set forth are amply suf-

ficient to meet the provision of the statute.

It is also contended that in order for appellant to be bound there must be a consideration passing to appellant. The consideration in this case is that appellee bound himself to accept and pay for the cider in question when delivered by appellant. This is all that is required in order to make the promise of appellant valid and binding.

It is also contended by appellant that the court erred in giving the first, second and third instructions given on behalf of appellee and in refusing the first, second, third and ninth instructions offered by appellant and refused by the trial court and in modifying the fourth instruction submitted by appellant and which was given by the court as modified. We have examined all of these instructions. Instructions 1, 2 and 3 given on behalf of appellee are in harmony with our holding in this case. Instructions 1, 2, 3 and 9 offered by appellant and refused by the trial court are in harmony with the contention of appellant but are entirely out of line with our holding and with the law governing this case as we understand it. There was no error in modifying the fourth instruction given on behalf of appellant and in giving it as modified. In our judgment the court did not err in its rulings on the instructions.

Lastly, it is contended by appellant that the verdict of the jury is excessive. The record tends to show that the price of cider jumped from seven cents a gallon to twenty-two cents a gallon before appellant finally refused to carry out the contract and that only a little over 200 bbls. had been delivered on the 800 bbl. contract. Said barrels run from 47 to 48 gallons per barrel so it is easily to be seen that the verdict of the jury was not excessive and that it is amply supported by the evidence.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported.

Term No. 33. Agenda No. 31.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term, A. D. 1919

MONROE BRANN, Appellee vs. NEW ENTERPRISE COAL COMPANY, Appellant.	Appeal from the Circuit Court, Williamson County

216 I.A. 652

Opinion by Boggs, P. J.

Suit was brought by appellee against appellant before a Justice of the Peace of Williamson County to recover damages alleged to have been caused to a certain tractor engine rented by appellee to appellant.

The claim filed in the Justice court was for $50, and there being no appearance on the part of appellant, judgment was rendered against appellant for said amount. On appeal to the Circuit Court a trial was had resulting in a verdict and judgment in favor of appellee for $100. To reverse said judgment this appeal is prosecuted.

It is first contended by appellant that the verdict is against the manifest weight of the evidence. The evidence with reference to the condition of the engine at the time the same was rented to appellant and at the time the same was turned back to appellee was conflicting. The evidence on the part of appellee being to the effect that the engine at the time the same was rented to appellant was in good workable condition and that when returned to appellee the flues were badly burned out, the platform was destroyed, the engine pump was out of condition, the hose had been damaged and there were other injuries not necessary to mention. On the other hand, the evidence on the part of appellant is to the effect that the engine was in a bad state of repair at the time it came to its possession; that it made repairs on the engine while in its possession and that the engine when returned to appellee was in as good or better condition than when received by appellant. The evidence being conflicting, it was for the jury to determine where the preponderance or greater weight of the evidence lay. After an examination of the evidence as disclosed by the record we are not disposed to disturb the finding of the jury in that behalf. It is next contended by appellant that the court erred in its rulings on the evidence. Certain questions calling for a conclusion were asked some of the witnesses for appellee. The questions were objected to by appellant and the objections were overruled and the witness was allowed to answer. Some of the answers were on motion stricken. Others, were allowed to stand. While it was error for the court to permit these questions to be answered, at the same time there was other evidence in the record unobjected to that fully sustained the verdict of the jury. We do not think that the error in permitting said questions to be answered is of such serious character as to require a reversal.

One of the rulings complained of with reference to the testimony offered by the appellant and which the court sustained an objection to was testimony to the effect that appellant did not appear before the Justice of the Peace. We do not think that the court erred in denying this testimony.

There were certain other of the rulings on the evidence, complained of, but we do not deem them of sufficient importance to warrant a discussion here. We are of the opinion there was no serious error in the rulings on the evidence.

It is next complained by appellant that the verdict of the jury is excessive. It is contended that inasmuch as appellee only filed claim for $50 in the Justice court that therefore it is to be conclusively assumed that his damages did not exceed that amount. Appellee on cross examination testified that when he brought the suit he was not represented by counsel and that he was of the opinion he was not allowed to bring suit for a larger sum before a Justice of the Peace. However that may be, we think the court was warranted on the trial in the circuit court, being a trial de novo, to allow appellee to increase the amount of his demand and we are also of the opinion there is no rule of law against allowing appellee to present evidence if he can, to the effect that his damages were greater than he at first brought suit for or first stated in his claim or demand. It may be a circumstance for the jury as tending to prove that his damages were no more than the amount he originally sued for. Appellant had the benefit of this circumstance for appellee was cross examined by appellant in regard to the amount he originally sued for.

Appellee filed no brief and we would be warranted in reversing the case pro forma but we did not do so but went into an examination of the case on the merits. In our view of the case the evidence is sufficient to warrant the verdict and there are no errors in the record of sufficient moment to require a reversal of the judgment. The judgment is therefore affirmed.

Judgment affirmed.

Not to be reported.

Term No. 39. Agenda No. 46.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term 1919.

MAR 25 1920

The People of the State of Illinois, Appellee vs Roscoe Stipp Appellant	Appeal from County Court Marion County, Illinois.

216 I.A. 652

Opinion by Boggs, P. J.

Appellant was arrested, tried and convicted in the County Court of Marion County, Illinois, on a charge of being the father of one Idys Kitchen's illegitimate child. The prosecuting witness, lived with her parents near Omega in Marion County and appellant lived a few miles distant from her in Clay County. On November 13th, 1917, appellant returned to his home in Clay County from Weldon, Illinois, where he had been working. Appellant testified that on the evening of November 16th, 1917, he took Miss Kitchen in company with another young lady home from a Y. M. C. A. meeting which was held at a church in that neighborhood. This being on a Friday evening. Appellant further testified that the following Sunday evening and the Sunday evening following that he was with the prosecuting witness and admits having had sexual intercourse with her on this last occasion. Appellant was corroborated by the speakers at said Y. M. C. A. meeting and by the Treasurer of the organization as to date of said Y. M. C. A. meeting, both of said witnesses testified that the date of the meeting was November 16, 1917.

The prosecuting witness testified that she first met appellant at the Y. M. C. A. meeting at the church and that the date thereof was October 16, 1917, but says that the first act of sexual intercourse did not take place until about October 20, 1917. Said child was born June 30, 1918 and the evidence tends to show that it was fully developed and weighed seven pounds at birth. The evidence in the record is further to the effect that the average period of gestation is about 280 days. If the evidence of appellant and his witnesses are correct there could not have been more than 225 days between the first act of sexual intercourse of said parties and the date of birth of the child. The record also discloses that the prosecuting witness had been keeping company with another young man immediately prior to her relations with appellant.

It is contended by appellant as ground for a reversal of the judgment in this case, that the verdict of the jury is against the manifest weight of the evidence; that the court erred in its rulings on the evidence and in its rulings on the instructions.

The prosecuting witness being uncorroborated in her testimony as to the material facts in the case we are of the opinion in view of the evidence as above set forth that the verdict of the jury is against the manifest weight of the evi-

dence. There was no serious error in the ruling of the court on the evidence.

Complaint is made by appellant as to the giving of the 1st, 2nd, 3d, 4th, 7th, 10th and 11th instructions given on behalf of appellee. There was no serious error in the giving of instructions Nos. 1 and 10 given on behalf of appellee. Instructions No. 2, 3, 4 and 11 given on behalf of appellee direct a verdict and are erroneous in failing to require the jury to find from the evidence certain elements necessary to make a case in favor of appellee.

Instruction No. 7 is as follows: "The court instructs the jury, that if you believe any witness or witnesses have knowingly and wilfully sworn falsely in this case, then you should disregard the evidence of such witness or witnesses, except as in so far as he or they, as the case may be, have been corroborated by other and credible evidence." This instruction is erroneous in not referring to "the material facts" in the case.

Appellee filed no brief and we would have been warranted in reversing the case pro forma under our rules but instead have considered the case on the merits.

For the reasons set forth the judgment of the trial court is reversed and the cause is remanded.

Reversed and remanded.

Not to be reported.

Term No. 42 Agenda No. 22

216 I.A. 652
FILED
MAR 25 1920

In The
APPELLATE COURT OF ILLINOIS
Fourth District
October Term, 1919.

Josephine Merkle, appellee vs Joseph Merkle, appellant	Appeal from City Court Alton, Illinois.

Opinion by Boggs, P. J.

A suit for separate maintenance was brought by appellee against appellant in the City Court of Alton, resulting in a verdict and decree in favor of appellee. The decree awarded her the custody of their five minor children for each alternate month. The custody of said children for the remainder of the time was awarded appellant; it was also provided that while appellee had the custody of the children she should be paid $15 per month by appellant and when appellant had the custody of the children she was to be paid $10 per month. To reverse said decree this appeal is prosecuted.

The record discloses that the parties hereto were married in 1904 and continued to live together as husband and wife until February 1916, and that during the greater part of said time they lived happily together. The record discloses that sometime during the year 1915 appellant became sick and the evidence tended to show he became suspicious of his wife and believed she was trying to poison him. He refused to eat at home, taking his meals elsewhere, sometimes at his sister. The testimony of appellee also tended to show he was guilty of acts of cruelty toward her, had become addicted to the excessive use of intoxicating liquor and had threatened her with violence. In February 1916, appellee filed an application in the County Court to have appellant declared insane. A commission of doctors were appointed by the County Court of Madison County, which said commission found appellant to be insane and he was sent to the hospital for the insane at Jacksonville, Illinois. Appellant was confined in said hospital between thirty and forty days and was then discharged as improved and was paroled to his brother, Wm. Merkle, who had in the meantime been appointed conservator of his estate.

Appellant on his return to Alton resumed his business as a sheet metal worker. Appellant did not live with his wife after his return from the hospital but paid for her support and that of the children up until about the month of July 1917, when he directed the merchants who had been furnishing groceries and other supplies to his wife and family not to furnish them goods after that time without an order from his conservator. Appellee thereupon filed her bill for separate maintenance charging that she was living separate and apart from her husband without her fault and that he had been guilty of acts of cruelty toward her and had become addicted to the excessive use of intoxicating liquors and had threatened her life. An answer was filed by appellant denying the acts

of cruelty and denying that he was using intoxicating liquor to excess and denying that appellee was living separate and apart from him without her fault. On hearing had before a jury a verdict was returned in favor of appellee and a decree was rendered thereon as above set forth.

Numerous errors are assigned on the record but in our view of the case the only question necessary for us to determine is as to whether or not a conservator having been appointed for appellant and not having been removed, the City Court of Alton had jurisdiction to entertain said bill for separate maintenance.

Section 5 of an Act to revise the Law in relation to idiots, lunatics, drunkards and spend thrifts, in force July 1, 1874, provides: "Such conservator shall have the care and management of the real and personal estate of his ward, and the custody of his person unless otherwise ordered by the court, and the custody and education of his children where no other guardian is appointed, unless the court orders otherwise; but this act shall not be so construed as to deprive the mother of the custody and education of the children without her consent, if she be a fit and competent person to have such custody and education."

Section 17 of said act provides: "The conservator shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, so far as the same may be necessary to the comfort and suitable support of his ward and his family, to the education of his children."

As we construe the foregoing sections of said statute we are of the opinion and so hold that a conservator having been appointed by the County Court of Madison County to take charge of the care and custody of the estate of appellant, appellee must thereafter look to said conservator for the care and support she is entitled to under the law from the estate of appellant and that while such conservator is so acting, a bill for separate maintenance will not lie.

At common law a bill for separate maintenance did not lie and the only relief afforded a wife whose husband failed to support her was that third parties could furnish her necessaries and recover from her husband therefor. In our view of this case appellant being under conservatorship cannot be sued personally for necessaries furnished his wife and family. The wife would have the right to apply to the conservator therefor and in the event that he should fail to furnish such necessaries, she could apply to and obtain from the court appointing said conservator an order directing said conservator to furnish necessaries in keeping with the estate of his ward, provided appellee furnishes the necessary proof that she is living separate and apart from her husband without her fault.

The law further is that a County Court having taken jurisdiction of a man's estate and having appointed a conservator therefor, said appointment cannot be attacked collaterally and is binding until set aside on appeal or by direct attack. Dodge, Conservator v. Cole, et al 97 Ill. 338; Blair v. Sennott, 134 Ill. 78. Balsewicz v. C. B. & Q. R. R. Co. 240 Ill. 238.

The County Court having acquired jurisdiction and appointed a conservator for appellant we hold that the City Court of Alton was without jurisdiction in this case.

The judgment of the City Court is therefore reversed and the cause remanded with direction to dismiss appellee's petition.

Reversed and remanded with directions.

Not to be reported.

Certiorari denied

Term No. 46. Agenda No. 55.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term, A. D. 1919.

216 I.A. 653

FILED

MAR 25 1920

CABIRANGE MANUFACTURING COMPANY, Appellee vs. AUGUSTA WILLARD, Executrix, Etc., Appellant.	Appeal from the Circuit Court of St. Clair County.

Hon. George A. Crow, Trial Judge

Opinion by Boggs, P. J.

This is an appeal from a judgment of the Circuit Court of St. Clair County in favor of appellee and against appellant for $4554.00. The record discloses that the Cabirange Manufacturing Company was the owner of certain patents for the manufacture of ranges known as "Cabirange" and having no factory or facilities with which to manufacture the same, entered into an agreement with one W. G. Willard, who was in the business of manufacturing stoves and ranges, to manufacture all the ranges desired by appellee for a period of one year beginning August 15th, 1916, such ranges to be manufactured in quantities as ordered by appellee, but no order to contain less than fifty ranges.

Said contract further provided that appellee was to furnish certain materials for Willard's use in constructing said ovens and the latter was to be entitled to certain compensation therefor, and that as soon as the materials to be furnished by appellee were used up, Willard was to furnish said materials for the manufacture of said ranges at prices to be named in a price list to be attached to said contract, and that the cost of such parts should not exceed $2.85 per complete set. The second amended declaration set out the contract in substance as above set forth and averred that on November 1, 1916 by parol agreement, the written contract was altered so as to eliminate certain work and the furnishing of certain materials by Willard, and that certain other changes were made whereby Willard was required to manufacture and furnish to appellee and the latter was required to order and accept from Willard all castings and parts required for its ranges. It was further alleged that on May 28, 1917 appellee ordered from 50 to 2000 parts going to make up ranges; and that Willard agreed to fill such orders during the unexpired term of said contract; that appellee was ready, willing and able to pay for same, and that Willard at first accepted and thereafter rejected said order, etc.

An additional count was filed in substance the same as above set forth, except it contains no averment to the effect that appellee agreed to purchase all of its castings from appellant's testate.

On February 12, 1918, W. G. Willard died testate and ap-

pellant, his widow, was appointed executrix of his estate and was made party defendant in this proceeding. The declaration was amended showing the death of Willard and making appellant party defendant. A demurrer was filed to the declaration as thus amended and was overruled. Thereupon a plea of the general issue was filed, and a trial was had, resulting in a verdict and judgment against appellant as above set forth.

Appellant urges for a reversal of the judgment in this case that the court erred in its rulings on the evidence, and the instructions, and in overruling the motion for a new trial. In discussing the assignments of error, we will first discuss the question of the sufficiency of the evidence to sustain the verdict and the judgment.

It is practically conceded that the original contract entered into between Willard and appellee was void for want of mutuality. Appellee, however, contends that it is not relying for a recovery in this case on the original contract; that while the contract is set out in the declaration as finally amended, it is only by way of inducement; that it is relying on a certain written order for castings, parts, etc., which it insists was accepted by Willard, appellant's testate, and that thereafter he, Willard, refused to fill said order for the reason that the expense incident to the manufacture of the parts had increased to such an extent that he could not afford to furnish them at the price agreed upon.

The second amended count of the declaration sets forth that the contract was changed by mutual parol agreement and that in and by said change, Willard was to be relieved of certain work that he had contracted to do in connection with said contract, and that Willard agreed to furnish all such parts, castings, etc. as appellee might want or desire and that appellee agreed to purchase from Willard all of such materials as they might require for the manufacture of said ranges. Appellant strenuously insists that the evidence does not support this count of the declaration and we are inclined to hold that it does not. There is no sufficient evidence in the record to the effect that appellee agreed to purchase from appellant's testate the castings and parts it might need in the manufacture of its said ranges

The additional count, however, does not contain the averment that appellee agreed or contracted to purchase from Willard said castings and parts, but the gist of this count is that appellee gave to Willard an order for certain parts and castings and Willard accepted said order and failed to comply therewith, and that appellee was damaged thereby.

In our judgment, the evidence in the record is sufficient to support this count of the declaration. Holloway testified to the effect that in the latter part of May, 1917, he called upon Willard at his plant at O'Fallon and discussed with him the matter of furnishing castings and parts in large quantities for the manufacture of appellee's ranges. It seems that up to this time the business conducted by appellee was not very extensive; while some orders had been given by them to Willard and had been filled under the contracts entered into, still the amount of goods so ordered and delivered had not been large. Holloway further testified that when he applied to Willard for the acceptance of a large order for parts and castings, Willard

stated that appellee had not paid its back bills and that until these bills were paid, he would not furnish any other materials. Holloway further testified that he stated to Willard that the company was prepared to take care of its bills and that he tendered Willard a check for the bill owing by the company. He further testified that Willard directed him to pay the money in to the St. Louis office (Willard having an office in St. Louis) and stated that when he paid this bill he would then accept his order. Holloway further testified that he went to the St. Louis office and paid the bill and then called on Willard and told him that he had paid the bill and that he wanted to give his order; that Willard in substance told him he would take care of it, but said to him to turn the order in to the St. Louis office: Holloway further testified that he mailed the order to the St. Louis office; that it was not filled and that some four weeks thereafter he and a Mr. Shumway called on Willard and inquired as to why the castings had not been furnished and that Willard stated, "That he would not make us castings because he would lose money; he could not hold his moulders, they were quitting moulding and going into the mines where they could get more money and he would not make our castings. I called Mr. Willard's attention that we had filed an order in good faith and he stated positively he had accepted the order in good faith, but since the advance of the price of the cast-iron he could not make the castings and would not make the castings at $3.35 a hundred."

The record discloses that after the refusal of Willard to furnish the castings, they were obtained elsewhere and that the difference between the price appellee was obliged to pay and the price that he was to have paid Willard amounted, in the aggregate, to the amount of the verdict in this case.

The law is that even though a contract of the character of the one here involved is void for want of mutuality, yet if goods are ordered under it and the order is accepted, it becomes a valid binding obligation, and for its violation an action may be maintained. In 13 Corpus Juris, Section 191, Page 341, it is said: "Accepted orders for goods under contracts void for want of mutuality constitute sales of the goods thus ordered at the prices named in the contracts. * * * The agreement (meaning the contract void for want of mutuality) constitutes a continuing offer to sell on the part of the offerer, which offer becomes effective as a contract pro tanto when accepted by an order of goods before it is withdrawn, or before it expires by limitation of time."

We hold that if it be conceded that the original contract entered into between appellee and Willard was void for want of mutuality, and even though the evidence in the record is not sufficient to show that the contract was changed in such a manner as to make it a binding contract on the parties thereto, still if appellee gave to Willard an order for goods at the price named in said contract and Willard accepted that order as made, it constitutes a valid and binding obligation between the parties,—appellee to accept and pay for goods, and appellant's testate to furnish them. In our judgment, the evidence in the record is sufficient to support that finding.

It is next contended by appellant that the witness Holloway was not a competent witness. When objection was made by appellant to Holloway's competency as a witness, the court

inquired of counsel for appellant the ground of the objection. Counsel in substance replied that Holloway was a party to the contract with Willard and Willard having died it thereby rendered the other party to the conversation or contract incompetent. It is also insisted by appellant that even though the incompetency of the witness Holloway was not shown at the beginning of his testimony, that it was before he completed the same and that for that reason the objection should have been sustained to his testimony. The evidence relied on is a letter written by Holloway on April 11, 1919 to one Walter White, in which he signed his name, "Holloway, Manager." No showing was made and there is nothing in the record to the effect that Holloway had any direct financial interest in this proceeding.

It does not follow that because a man may be an officer of a corporation that he therefore has a pecuniary interest in the same. In Southern Collegiate Inst. vs. Avery, 157 App. 568, the court at page 570 says: "We do not understand the ground of appellant's contentions to be that Hines and Strawn were incompetent as witnesses because they were officers of the Institute, but that Hines' salary might be dependent in part upon the money that might be collected from Avery's estate, and because they might possibly be called upon to pay the note upon which they were sureties. The presumption is, that one offered as a witness is competent to testify, and the burden is, therefore, upon one who objects to state and prove the grounds of his objection. Campbell vs. Campbell, 130 Ill. 466; Boyd vs. McConnell, 209 Ill. 396. The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. To render Hines and Strawn incompetent as witnesses against appellant, it must appear that they had a present, certain and vested interest in the result of the suit, and not an interest uncertain, remote or contingent. 1 Greenleaf on Evidence, secs. 390, 408, and 409; Illinois Mutual Insurance Company vs. Manufacturing Co., 1 Gilm. 236; Curtenius vs. Wheeler, 5 Gilm. 462; Feitl vs. Chicago City Railway Co., 211 Ill. 279."

In Campbell et al vs. Campbell et al, 130 Ill. 466, the court at page 472 in quoting from Stewart Rapalje, on Law of Witnesses, (page 293, sec. 171,) says: " 'It is a well settled rule that the competency of one offered as a witness to testify in the case will be presumed, and the party objecting to his competency must state the grounds of his objections.' And on page 299, (sec. 177,) it is said: 'The presumption being in favor of competency, the burden is upon the objector to prove that one one offered as a witness is incompetent to testify, by reason of interest or otherwise.' "

In view of the holding of the Supreme and Appellate Courts in the foregoing cases, we are clearly of the opinion that the witness Holloway was competent, so far as anything appearing in the record is concerned.

It is next contended that the court erred in sustaining an objection to the testimony of Funk, one of the officers or office men in Willard's St. Louis office, to the effect that Holloway submitted an order for a large quantity of castings and parts and that Funk, as representing Willard, refused to accept the

same. There was no error in the ruling of the court in sustaining an objection to this testimony for the reason that appellee does not rely on an order accepted at the St. Louis office, but on an order accepted directly by Willard himself. In our view of the case, it did not matter even though Willard's representative at the St. Louis office may have refused to accept the order of appellee, provided Willard himself, who was the owner and proprietor of the business, accepted the same. In other words, the agent could not have more authority in that regard than the principal. This proposition of law seems so palpable that it needs no citation of authority.

It is next insisted by appellant that the court erred in refusing the 7th, 11th, and 17th instructions offered by appellant and which were refused by the court. The seventh instruction is an abstract proposition of law to the effect that before appellee could recover he must prove his case by a preponderance of the evidence. It has frequently been held that it is not error to refuse an abstract proposition of law. Crane Co. vs. Tierney, 175 Ill. 79; Latham vs. C. C. C. & St. L. Ry. Co., 164 App. 559. But without reference to this proposition instruction No. 2 fully instructed the jury with reference to the burden appellee assumed in proving his case, and there was no occasion for giving a second instruction on the same point.

The court did not err in refusing the 11th and 17th instructions referred to for the reason that said instructions practically told the jury that appellee must prove that the contract in question was changed and that appellee must recover thereon, if at all.

In view of what we have already said, we do not think that appellee's right to recover was limited to that extent.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed:

Not to be reported.

Term No. 52. Agenda No. 28.

216 I.A. 653

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term, A. D. 1919.

MAR 25

HENRY FITZGERALD, Appellee vs. W. H. NEVILLE and J. L. NEVILLE, Appellants.	Appeal from the Circuit Court of Massac County.

Opinion by Boggs, J.

An action in assumpsit was brought by appellee against appellant in the Circuit Court of Massac County to recover a balance alleged to be owing by appellant to appellee on a building contract. A trial was had resulting in a verdict and judgment in favor of appellee for $106.57. To reverse said judgment this appeal is prosecuted.

The declaration consists of one count. To which was filed a plea of the general issue. No complaint is made of the ruling of the court on the evidence. The bill of exceptions does not contain the instructions, and so far as we are able to ascertain does not contain the motion for a new trial. This being the state of the record, there is really nothing for this court to review. We have, however, read the evidence in the bill of exceptions and we find that the question sought to be raised is as to whether or not appellee has complied with the provisions in a building contract alleged to have been entered into between him and appellant to the effect that hard brick should be used in the outside walls. On this question the testimony was conflicting. The witnesses on the part of appellee testified that hard brick was used in the construction of the outer part of the wall and soft brick was used to fill in the inner part of said wall. On the other hand the witnesses on behalf of appellant testify that no hard brick were used. That in the construction of said wall both as to the outside four inches of said wall, as well as the inside part of its construction soft brick were used. From an examination of this evidence we are not able to say that the verdict of the jury in favor of appellee's contention is against the manifest weight of the evidence. This being true, we would not be justified in reversing the judgment on this ground, even though the motion for a new trial and the ruling thereon had been properly preserved for our review in the bill of exceptions.

It should further be observed in this case that no such contract as contended for was offered in evidence by either appellee or appellant. A purported written contract was filed with the declaration designated instrument sued on. But this contract was not offered in evidence and is therefore not before us for examination.

It is seriously insisted by appellant that appellee cannot recover on the common count but should have filed a special count in order to maintain his suit. The record, however,

discloses that the work has been completed aand that the building has been accepted by appellant. This being true, then on appellee's theory of the case, he was entitled to recover the balance owing on the contract price which it is conceded was $106.57.

We are therefore of the opinion that in any view of the case as submitted by the record this judgment should be affirmed.

Judgment affirmed.

Not to be reported.

Term No. 56. Agenda No. 34.

216 I.A. 653

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term, 1919.

MAR 2

FERDINAND BRENTZ, Appellee vs NAUM EVANGELOFF, Appellant.	Appeal from City Court Granite City, Illinois.

Opinion by Boggs, P. J.

An action on the case was instituted by appellee against appellant in the City Court of Granite City to recover damages for the alleged alienation of the affections of the wife of appellee.

The declaration consists of one count and charges in substance that by the making of presents, clandestine meetings and other means and conduct, appellant had alienated the affections of appellee's wife and caused her to neglect appellee and the children of appellee and his wife, and had caused the separation of appellee and his said wife. To this declaration a plea of the general issue was filed. A trial was had resulting in a verdict and judgment in favor of appellee and against appellant for $1000. To reverse said judgment this appeal is prosecuted.

The only ground urged by appellant in his brief and argument for a reversal of this case is the giving of the first instruction given on behalf of appellee. Said instruction being as follows:

"The Court instructs the jury that the law gives a husband the right to sue a third person for alienating the affections of a wife, and the Court instructs you in this case that if you believe, from a preponderance of the evidence, that the defendant did, by a course of conduct towards the plaintiff's wife, cause the wife to lose affection for her husband so that the husband lost the companionship, society and affection of the wife, then you will find in favor of the plaintiff and assess his damages in a sum not exceeding five thousand dollars."

This instruction is not accurate in its terms or as to the elements that the jury should take into consideration in arriving at the amount of damages that should be awarded appellee if they found the issues in his favor. However, the principal objection made to this instruction on the part of appellant is with reference to that part of the instruction which provides "then you will find in favor of the plaintiff and assess his damages in a sum not exceeding five thousand dollars." It being the contention of appellant that the court erred in calling the attention of the jury to the amount of the ad damnum in appellee's declaration. In other words, referring to the amount sued for. While the Supreme and Appellate courts have on several occasions criticised the reference in an instruction to the amount of the ad damum in a declaration, still we do not understand that such reference will necessarily be ground for reversing a judgment without reference to whether

or not the record would indicate that the jury had been affected in making up the amount of their verdict thereby. In this case the verdict returned by the jury was only $1000. or one fifth of the amount of the ad damnum so that, as far as the verdict of the jury is concerned there is nothing to indicate that the jury were in any wise affected by the amount referred to in the court's instruction. Appellee concedes that the evidence offered on the part of appellee warranted the submission of the case to the jury. In other words that if the jury believed the testimony of appellee's witnesses, it would be warranted in finding a verdict in his favor. The evidence on the part of appellee's witnesses supports the allegations of the declaration and clearly makes a case against appellant. The evidence being to the effect that appellee and his wife had lived at Madison, Illinois, for several years and that up until the acts complained of on the part of appellant, they had lived happily together. Appellant's wife had died about three years prior to the commencement of this suit and that after her death appellant began calling on appellee's wife in appellee's absence; that he visited her practically every day and sometimes two or three times a day under the pretence of soliciting the sale of groceries. Appellant being in the grocery business. That he had taken tea with appellee's wife and frequently made her presents and on one or two occasions made presents to appellee's children, at the same time requesting them that they should not say anything to appellee about it; that on one occasion appellant was observed kissing appellee's wife. The evidence also is to the effect that after appellant began bestowing his attention on appellee's wife, she lost her love and affection for appellee and his family. That appellee's wife on one occasion said to appellee that she did not care for him and that she had the opportunity to marry a rich man.

The only evidence tending to contradict this testimony is the evidence of appellant who denied that he had ever been guilty of bestowing his affections on appellee's wife or of any of the acts charged against him. Appellant also offered in evidence on the trial of said case a decree of divorce entered in the suit brought by appellee's wife against appellee, charging him with drunkenness and cruelty. It seems that appellee did not appear and that a decree went against him by default. If the jury were warranted in finding the issues for appellee, and we hold that they were and that by a clear preponderance of the evidence, then the verdict was not excessive and was amply sustained by the evidence. In fact it was not argued by appellant's counsel in his brief and argument that the verdict is excessive. This being true, we would not be warranted in reversing the judgment merely because the instruction given by the court on the measure of damages was more or less inaccurate. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253; Spring Valley Coal Co. v. Rowatt, 196 Ill. 156.

In Spring Valley Coal Co. v. Rowatt, supra, at page 161 the court says. "It is next insisted that it was error for the court to give instruction No. 1 and instruction No. 6 for the plaintiff, for the reason that by them the jury were told that they might give plaintiff such damages as would reasonably compensate him for the injury he had sustained, without limiting them to the amount sued for. The ad damum clause of the declaration was for $20,000. and the evidence seems to in-

dicate that the plaintiff is permanently injured. The amount of damages recovered in this case was $1200. which, from a review of the whole case, is reasonable. It could not be said that the jury were misled by such instructions or that the defendant was prejudiced in any way by the giving of them. The appellant, in the court below, did not assign as error that the verdict of the jury was excessive, and we cannot see that it was injured in any way by the giving of either of said instructions."

In Keokuk Bridge Co. v. Wetzel, supra. the court at page 259 says: "While the instruction given should have been limited so as to apply only to the physical injury which was sustained by the appellee, we do not think, in vew of the severe character of appellee's injury and the amount of their verdict, that the jury were misled by this instruction, and are of the opinion that the giving thereof did not constitute reversible error."

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported.

Term No. 11. Agenda No. 2.

In The
APPELLATE COURT
Fourth District.

October Term, 1919.

Filed March 25, 1920

The People of the State of Illinois, ex rel, Defendant in error, vs. William Arms, Alias "Whiskey Bill", Plaintiff in error.	Error to the County Court of Franklin County.

216 I.A. 653

Eagleton, J.

The plaintiff in error was indicted by the Grand Jury of Franklin County on a charge of selling intoxicating liquor in Anti-Saloon Territory and the indictment certified to the County Court.

In the indictment the plaintiff in error was charged as "William Arms alias Whiskey Bill". Before pleading to the indictment the plaintiff in error entered a motion to quash the indictment which was overruled and this ruling of the court is one of the errors assigned. The ground on which it is insisted the indictment should have been quashed is because the name of the defendant was given as "William Arms alias Whiskey Bill".

The court did not err in this ruling. It is sometimes proper to set forth different names by which a defendant is known by different witnesses and again other reasons sometimes exist why different names by which a defendant is known may be set forth in an indictment. However, no reason appears, in this case, why any name, other than the legal name of the defendant, should be given. No witness found it necessary to identify the defendant by the name of "Whiskey Bill" nor did any other circumstance arise showing the necessity of using the name "Whiskey Bill". Where it is not necessary it is not good practice to set forth the name of a defendant and an alias and should not be resorted to. However, the using of an alias cannot be made grounds for quashing an indictment and the court did not err in overruling the motion to quash.

After the motion to quash was overruled the plaintiff in error entered a plea of not guilty and the case was tried by a jury and, after hearing the evidence, the jury signed and returned into court, as its verdict, an instrument in the following form:

"The court instructs the jury on the form of your verdict, If you find the defendant, William Arms, not guilty your form of verdict shall be, 'We, the jury, find the defendant, William Arms, not guilty.'

1.	7.
2.	8.
3.	9.
4.	10.
5.	11.
6.	12.

or

If you find the defendant, William Arms, guilty the form of your verdict may be, 'We, the jury, find the defendant, William Arms, guilty as charged in the indictment, in count (here insert number of counts on which you may find defendant guilty, if any) one, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.' "

Thereupon the plaintiff in error entered a motion for a new trial, which was denied, he then entered a motion in arrest of judgment, which was also denied, and the court assessed a fine against the plaintiff in error of $20.00 on each of fifteen counts in the indictment and adjudged the costs against him.

It is next urged by the plaintiff in error that the judgment of the trial court must be set aside for the reason there was no proof that he was ever known as or called "Whiskey Bill" and that the indictment having set forth that name as an alias it was a material allegation and must be proven. In support of this position the plaintiff in error cites the case of Goodlove v. State—85 Ohio State 365. In that case it was charged that one Percy Stuckey, alias Frank McCormick has been killed and no proof was made that a person named Stuckey had ever existed and for that reason the case was reversed. That is not the condition here presented. The correct name of the plaintiff in error was set forth in the indictment and all the evidence offered was as to sales of intoxicating liquors made by William Arms.

It is next contended that the instrument returned by the jury is not a verdict. An examination of the so called verdict discloses it begins with a form of verdict finding the defendant not guilty and concludes with a form finding him guilty. It is possible to conjecture that the jury intended the portion of the verdict finding the defendant guilty as its verdict but the court should not be required to speculate as to what the verdict of a jury is when it is returned into court. It was clearly a mistake on the part of the jury but it was such a mistake as leaves the record without a verdict of any kind. The court should have granted a new trial and in failing to do so erred.

Plaintiff in error contends that the proof does not show he was guilty of selling intoxicating liquors. As the case must be tried again no opinion will be expressed on the sufficiency of the evidence.

For the reason indicated the judgment of the trial court is reversed and the cause remanded for a new trial.

Revised and Remanded.

Not to be reported.

Term No. 26. Agenda No. 14.

In The

APPELLATE COURT

Fourth District

October Term, 1919

MAR 25

216 I.A. 653

JOHN L. BECKER Appellant, vs. MAGGIE M. BECKER Appellee.	APPEAL FROM THE CIRCUIT COURT OF FAYETTE COUNTY.

Eagleton, J.

The appellant, John L. Becker and the appellee, Maggie M. Becker, were married in 1913 and ceased living together in August, 1917. Their married life was interrupted by separations at different times.

When they lived together they resided on a farm in Piatt County where the appellant was residing at the time this suit was commenced and the summons served on him. At the time of the separation in August, 1917, the appellee went to live with her mother in Fayette County. Some time thereafter and while she was residing in Fayette County the appellee commenced a suit for divorce against the appellant in the Circuit Court of Fayette County and in response to a summons in that case the appellant was attending the trial of said divorce case in Fayette County when the summons in this case was served on him.

This is an action of trover brought by the appellee against the appellant to recover the value of certain chattels charged to have belonged to the appellee and to have been converted by the appellant to his use. These chattles consisted of a certain cooking range and other household furnishings and about 300 chickens, all of the value of $700.00.

The chickens are a portion of a certain flock formerly belonging to the mother of the appellant and the increase of that flock. The original flock was purchased from the mother of the appellant some time after the marriage of the parties in this suit. Each of the parties in this cause claims to have been the purchaser thereof.

As to the other property in question it appears the appellant and appellee separated for a short time in August, 1916 and that at the time of separating they made a property settlement in which the appellant paid the appellee $2.00 for each week of their married life, which amounted to $342.00. In making this payment the appellant paid the appellee $10.00 in cash and gave her a check on a bank for $332.00. The appellee deposited the check in her name in the bank. Shortly thereafter they again resumed their marital relations and the appellee gave the appellant a check for the $332.00 she had in the bank. The appellant expended $135.55 of this money for a portion of the household goods in controversy.

The cooking range in question was purchased at a cost of $85.00.

It is not controverted that the property in question was in the possession of the appellant at the time of the last separation nor is there any dispute as to the value thereof. The

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whole controversy is as to the ownership of the property.

The appellant first filed a plea in abatement to which a demurrer was sustained. He then filed a plea to the merits on which issue was joined and the cause tried by a jury. A verdict was returned in favor of the appellee for $432.00 and after appellant's motion for a new trial was overruled, judgment was rendered in favor of the appellee on the verdict.

There is no error pointed out in the instructions nor in the admission or rejection of evidence. The only questions presented being as to the ruling of the court in sustaining the demurrer to the plea in abatement and that the verdict is not supported by the law and the evidence.

In his plea in abatement the appellant averred that he was a resident of Piatt County and that he was not served with process in that County but he was summoned as a defendant in ~~said~~ A suit for divorce brought by the appellee against him in the Circuit Court of Fayette County and that in response to said summons he was in attendance in said Circuit Court at the time the summons in this cause was served on him, wherefore the court ought not take further cognizance of this cause.

There was no averrment in this plea that any fraud, trick or device was used to get the appellant to come to Fayette County and for that reason the demurrer was properly sustained.

"The defendant was found and duly served in Tazewell county, and we have held that unless he was there by reason of some fraud, artifice or trick on the part of the plaintiff, or some one acting for him in order to obtain service upon him he was properly found within that county, within the meaning of the statute."

Willard v. Zehr, 215 Ill. 148.

It is argued that the sum of $332.00 for which the appellee gave the appellant a check and a portion of which was used in purchasing certain of the property in controversy, was paid by the appellant to the appellant in consideration that they live separate and apart and that they again lived together the appellee violated the agreement and thereby the appellant became entitled to the money in question. This argumnt is based on the theory that where one party to an agreement violates the agreement the other party is entitled to recover the consideration paid by him. To hold that the appellee broke the agreement by living with her husband and that the husband in no wise consented to the breach of the contract to live separate would be anomalous indeed. If this position had any standing in fact it must be held to be against the public policy. It is against the public policy for a husband and wife to assume a position whereby they cannot live together without financial loss to one of them and the relationship continue.

It is next argued that under the law a wife cannot recover from her husband for services rendered while the marital relations existed. This position is correct in a proper case but this is not such a case. In this case the appellee is seeking to recover the value of her separate property from her husband and if the property belonged to her the relationship of husband and wife is no bar to the action.

This leads to the question as to the weight of the evidence. That the appellee gave the appellant the $332.00 she had in the bank is not disputed. It is also a fact that of this sum of

$135.55 was in invested in furniture. The appellant testified he purchased it for himself and denies he agreed to purchase it for the appellee while the appellee testified that the appellant expressly agreed to purchase the furniture for her. As above stated the appellee claimed she purchased and paid for the chickens and the appellant said he bought them.

The cooking range was purchased and the price paid as above stated. The appellee testified the money therefor was the proceeds arising from the sale of eggs and produce belonging to her and the appellant testified the range was purchased with his money and belonged to him.

The jury heard the witnesses as did also the court and no error having been pointed out in the instructions nor in the admission or rejection of evidence, the verdict will not be disturbed unless manifestly against the weight of the evidence.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Affirmed.

Not to be reported.

Term No. 32.

Agenda No. 44.

FILED
MAR 25 1920

In The
APPELLATE COURT,
Fourth District
October Term A. D. 1919.

HERBY WORTHY, Appellee,
vs.
CHRISTIAN H. BIRK, LINA BIRK and J. W. HUTTON, Appellants.

Appeal from the Circuit Court of Jasper County.

216 I.A. 653

Eagleton, J.

In 1917 Herby Worthy and Grace Umfleet, both of Jasper County, Illinois, were married. Herby Worthy was the son of Charles Worthy and wife and Grace Umfleet was the daughter of Christian H. Birk and Lina Birk, his wife. Grace Umfleet having been previously married. The families lived in the same neighborhood and both were prominent farmers. Immediately after the marriage Herby Worthy and his wife went to Chicago to live.

Prior to his marriage Herby Worthy registered in Jasper County under the Selective Draft Law and, in the latter part of 1917, accompanied by his wife, he returned to fill out his questionaire. While there Worthy and his wife spent several days at the home of Christian H. Birk and Lina Birk and trouble arose between Mrs. Birk and Worthy.

In March 1918, Mrs. Worthy was expecting to be delivered of a child and shortly prior to the 15th of that month she went to a hospital in Chicago, where the child was born. Mrs. Worthy remained at the hospital until April 6, 1918, at which time she was taken to rooms where they were to live. On April 10, 1918, Mrs. Worthy suddenly died.

On the morning of April 11, 1918, Worthy started from Chicago with his little child and the body of his wife and arrived at Newton on the evening of the same day. When he arrived at Newton, Christian H. Birk met him at the train and requested that Worthy take the body of his wife to the Birk home. At first Worthy refused to do this but later consented that the body be taken to the Birk home for thirty minutes which was accordingly done. The body was then taken to the home of Worthy's father from which it was taken, on the next day, to the South Muddy Church where the funeral ceremony was held and the body buried in the adjacent cemetery.

On June 27, 1918, Herby Worthy was called to the army and sent to Camp Taylor, Kentucky, from where he was transferred to Camp Greenleaf, Georgia.

Shortly after the funeral of Grace Worthy, Christian H. Birk and George Stanley, an uncle, went to Chicago and Birk employed a detective agency to investigate the cause of the death of Grace Worthy, and one A. C. Talmage was assigned by the agency to make the investigation.

On July 18, 1918, Birk filed a petition in the County Court of Jasper County, and pursuant thereto that court entered an order directing the coroner of Jasper County to hold an

inquest over the body of Grace Worthy. On the next day Dr. T. L. Hutton, who was the coroner of Jasper County, empaneled a coroner's jury and caused the body of Grace Worthy to be exhumed and an autopsy to be made. In making the autopsy the heart, liver, stomach and other internal organs were removed and the remainder of the body re-interred.

In making the autopsy the coroner called Dr. J. W. Hutton, who is a brother of the coroner and is also a practising physician at Newton, Illinois. Christian H. Birk and George Stanley were both present when the body was taken up, as was also Charles Worthy, the father of Herby Worthy. C. D. Fithian, an attorney who appears as one of the attorneys for Herby Worthy in this case, was also present.

Before the grave was opened the elder Worthy forbade the opening of the grave and asked Fithian, as an attorney, for advice in the matter. He also telephoned for Dr. F. J. Weber of Olney to come. After some delay and before Dr. Weber arrived the body was taken out and opened for the removal of the organs desired. In making the opening incisions were made in some of the organs sought to be removed. After Dr. Weber arrived the autopsy was finished and the organs taken were put in a milk can and taken to Newton where the can was sealed. The parts were examined by Dr. William D. McNally, Coroner's Chemist of Cook County. Dr. McNally reported to the Coroner of Jasper County that in his opinion the cause of the death of Grace Worthy was myocarditis and infectious nephritis.

After the removal of Grace Worthy from the hospital in Chicago a Dr. Hart was called to attend her. Dr. Hart made his last call on April 9th and no one answering him at the door he did not see her on that day. Immediately after her death Herby Worthy called Dr. Hart, who issued a certificate giving the cause of the death as organic heart disease, which from the evidence in the record, appears to include myocarditis.

The coroner's jury made and returned their verdict on August 20, 1918.

Herby Worthy procured a furlough in August, 1918 and returned to his home in Jasper County for a visit after which he returned to Camp Greenleaf and was finally discharged December 24, 1918.

Herby Worthy brought suit for damages against Christian H. Birk, Lina Birk, J. W. Hutton, T. L. Hutton and George Stanley. Before the case went to the jury the plaintiff dismissed George Stanley as a party defendant. The jury found the defendant, T. L. Hutton, not guilty and found the defendants, Christian H. Birk, Lina Birk and J. W. Hutton guilty and assessed the plaintiff's damages at $3000.00. A motion for a new trial being denied judgment was thereupon rendered on the verdict from which this appeal is prosecuted by said defendants.

The declaration contained two counts. The first count charged the appellants with a conspiracy for the purpose of injuring the appellee and mutilating the body of his wife and that they did cut, tear and mutilate the body of his wife. The second count charged the appellants with conspiring to injure the appellee by charging him with the murder of his wife and in furtherance thereof removed the body from the grave and

removed certain organs therefrom and replaced the body in the grave in a mutilated condition. In each count was an averrment that the appellee was a devoted husband.

It is first argued by counsel for the appellants that because the jury found the Coroner not guilty all acts properly traceable to him that were performed by him in his official capacity are eliminated and that the acts of the Coroner in empaneling a jury etc. are not to be considered.

It does not follow that because the Coroner was found not guilty that his part in the transaction is removed from the law suit. The fact that one charged as a joint tort feasor is found not guilty does not render proof of his acts incompetent as to the others. (Lasher v. Littell, 202 Ill. 551.)

The appellants contend there is no proof of a conspiracy. In this connection it is argued that because there was no proof of a conspiracy the court erred in permitting proof of declarations conduct and acts of one of the appellants when the others were not present as there is no proof in the record showing ratification by such other defendants. This position is based on the assumption that before there can be a conspiracy the parties thereto must meet and formulate an agreement or a course to be pursued and thereafter attempt to carry it out.

In Spies, et al, v. The People, 122 Ill. 1—it was held by the Supreme Court quoting from Greenleaf on Evidence: "That though the common design is the essence of the charge of conspiracy, it is not necessary to prove, that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. It it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to attainment of that same object, the jury will be justified in the conclusion, that they were engaged in a conspiracy to effect that object."

While the common design is a necessary element of a conspiracy it may be shown that the common design existed and was being carried out without proof that the parties agreed on any particular plan for accomplishing the end sought. If they wrongfully inspired the act of some third party they must answer for that act.

On the trial the appellee was permitted to prove certain statements made by the detective, Talmage. These statements were not made in the presence of either of the appellants. It is sought to justify this action under the rule that a principal is answerable for the acts of an agent done within the scope of his authority. For the purpose of proving the agency the appellee called the appellant, Christian H. Birk, who testified to employing the detective agency to investigate the cause of the death of Grace Worthy. Dr. Dennison was a witness, who testified as to statements made by Talmage. He said that he talked with Talmage and that Talmage said to him that he had investigated the case and was working for Mr. Birk and that Birk was willing to spend all kinds of money on the case. That he (Dennison) told Talmage there was nothing to the case and that Talmage was fooling his time away. There was other evidence of the same character admitted. This was incompetent and the court erred in ad-

mitting the same. Clearly these statements cannot be said to come within the rule stated. On the other hand they are not such statements made by one conspirator as will bind his co-conspirators. In Spies et al, v. The People, supra, on page 237, the Supreme Court held: "Declarations that are merely narrative as to what has been done or will be done, are incompetent and should not be admitted except as against the defendant making them, or in whose presence they are made."

On the trial the appellee was permitted to testify that he saw articles published in some of the metropolitan newspapers. He was not permitted to prove the contents of these articles. Appellants argue that the court erred in admitting this proof. In an action of this character mental suffering is an element to be considered by the jury. (Mensinger v. O'Hara, 189 Ill. App. 48.) For this reason the court did not err in its ruling admitting this evidence.

W. F. Johnson and H. C. Davison, both of whom are attorneys at law and the latter County Judge of Jasper County, were called as witnesses and permitted to testify about certain conversations with the appellant, Christian H. Birk. It is urged that the conversations detailed were privileged for the reason that the relation of attorney and client existed between said appellant and each of the attorneys at the time of the conversations between them respectively. An examination of the record does not show that that relation existed between said appellant and either of said attorneys at the time of the conversations given in evidence.

Another matter complained of is the action of the trial court in admitting in evidence a druggist's record showing the purchase by a young lady working in the office of Dr. J. W. Hutton of four ounces of arsenic for Dr. J. W. Hutton on the day preceeding the autopsy on the body of Grace Worthy. It appears that Dr. Hutton was engaged in the general practice of medicine and also appears that he, as well as other physicians, purchased poisonous drugs but it does not appear that he had this drug or any other drug with him at the autopsy nor that he made any effort to place the same on any part of the body. The only purpose the proof admitted could serve was to give the jury the right to speculate as to some purpose for which it might have been purchased. For that reason the court erred in admitting the evidence.

On the trial the court permitted the appellee to amend the declaration by adding to the second count an everrment that he had expended divers sums of money for lawyer's fees and for the services of physicians and as personal expenses in defending himself. Under this averrment the appellee was permitted to testify that he had paid out about $300.00 together with certain fees to doctors and lawyers. These bills are not proper in this class of cases. Knefel, et al v. Ahern, 57 Ill. App. 568; Washburne, et al v. Burke, 84 Ill. App. 587.

On the trial the appellants offered in evidence a piece of cardboard on which was written a statement said to be in the handwriting of Grace Worthy. The court sustained an objection to this and the ruling is assigned as error. Certain declarations claimed to have been made by Grace Worthy were also offered in evidence and odjections sustained thereto.

The court did not err in either ruling. It is not pointed out in what way the admission of either could have been com-

petent. If for no other reason they would be incompetent for the reason that neither was made in the presence of the appellee.

Complaint is made about certain statements made by the court during the trial and by counsel for the appellee in the argument of the case. There is but one statement made by the court that is criticised and the only exception preserved to that is as to the ruling made. As to the statements made by counsel, they were not of a serious character and besides the ruling of the court is not preserved.

Counsel take the position that the court should have instructed the jury to find the defendants not guilty. This is based on the theory that a conspiracy was not proven because there was no proof that the defendants or any two or more of them actually agreed on a common design. This argument is answered in a former part of this opinion.

The second and third instructions given at the request of the appellant being applicable only to the separate plea of justification filed by the coroner the appellants are not in position to complain of the matters therein contained.

The fourth, ninth and the first paragraph of the twenty-first given instructions each state abstract propositions as the law. The fourth might be construed by the jury as a statement by the court that there were no facts or circumstances showing probable cause for holding the inquest while the ninth concludes that if it appears that death was occasioned by accident or natural causes an autopsy cannot be held and the first paragraph of the twenty-first deals with the right of preservation and burial.

The tenth instruction is directory and does not limit the right of recovery to the charge laid in the declaration but informs the jury that if two or more of the defendants conspired for the purpose of charging the appellee with a crime or for any other unlawful purpose they should find such defendants guilty.

The twelfth instruction informed the jury that if they believed there was no good reason to believe that Grace Worthy came to her death by violence, casualty or undue means the coroner had no right to hold an inquest. This instruction directed the jury to base their judgment on the evidence before them as it existed at the trial while the defendants were chargable with knowledge of the conditions as they existed at the time of the inquest.

Appellee's eighteenth instruction was on the credibility of witnesses and in it the jury were informed that if they considered any witness had sworn wilfully falsely as to any matter involved they might reject the whole testimony of such witness etc. This instruction omitted the essential element that the false testimony must be material to the issues.

The eleventh instruction given at the request of the appellee was on the elements of damage and authorized the jury to include attorney's fees, physician's bills and personal expenses of the plaintiff. What has been said with reference to these matters in another part of this opinion applies to this instruction. It was error to include them. Complaint is made that certain other instructions given for the appellee on the question of proof omitted the statement that the matters involved must be proven by a preponderance of the evidence.

An instruction given for the appellants covered this matter and as the instructions are considered as a series this objection cannot be sustained.

The appellants also urged that certain instructions offered by them were refused by the court. An examination of the instructions given at the request of the appellants shows they embodied the principles in the refused instructions so far as they were proper.

For the errors indicated the judgment of the circuit court is reversed and the cause remanded for a new trial.

Reversed and Remanded.

Not to be reported.

Term No. 36. Agenda No. 35.

In The

APPELLATE COURT, FOURTH DISTRICT.

October Term A. D. 1919.

MATILDA WENGER, Appellee, vs. GEORGE IDOUX, Appellant.	APPEAL FROM THE CIRCUIT COURT OF ST. CLAIR COUNTY.

Eagleton J.

216 I.A. 654

In the summer of 1917, the appellee, Matilda Wenger, was engaged in truck gardening and raising flowers near Columbia, Illinois. She marketed her products in St. Louis, Mo., making trips to that city about once each week in a light vehicle drawn by one horse. In making these trips she would drive to Dupo, thence to East St. Louis and then to St. Louis.

In the forenoon of August 11, she made a trip to St. Louis returning that night. When about two miles north of Dupo about 12:15 A. M. she met George Idoux, the appellant, who was traveling in the opposite direction in an automobile. In passing, the automobile of the appellant and the vehicle of the appellee collided throwing the appellee to the ground and injuring her and damaging her vehicle.

After the collision the appellant took the appellee in his automobile to Dr. Marxer, a physician at Dupo, who examined the appellee and placed some bandages on her.

On August 27, 1918, this suit was begun and a declaration containing one count filed in which it was charged that the appellant negligently and carelessly operated his automobile and thereby caused the same to strike the vehicle in which the appellee was riding and divers parts of the vehicle were broken and damaged and the appellee thrown upon the ground and certain bones about her shoulder broken and that she suffered divers bruises and injuries about her head, back and other parts of her body and suffered great pain and was permanently injured. The ad damnum was laid at $2000.00.

A trial before a jury resulted in a verdict in favor of the appellee for $850.00 and after a motion by the appellant for a new trial had been denied, judgment was rendered on the verdict and this appeal prosecuted.

The errors assigned and discussed in appellant's argument are that the court erred in admitting and excluding evidence, that the verdict is against the weight of the evidence, that the court erred in refusing instructions offered by the appellant and that the damages awarded the appellee are excessive.

The appellant, as a witness in his own behalf, was asked by his counsel if there were any lights on the vehicle driven by the appellee, An objection by the appellee was sustained to the question and the ruling of the court is assigned as error. In support of his position that the question was proper the appellant cites the case of Livingston v. Blind, 138 Ill. App. 494.

In that case a boy had been killed in the night time by a wagon. In the evidence it appeared there were no lights on the wagon and it was assigned as error that the court per-

mitted the evidence to go to the jury. The Appellate Court held: "The pleadings did not allege that there were no lights on the wagon, ———————— but, on the other hand the absence of lights was not relied on as entitling the plaintiff to recover. The instructions were such as plainly precluded the idea that the jury could find for the plaintiff on that ground." The effect of this decision is to hold that whether there were or were not lights on the wagon should not be considered by the jury and if so it is not error to sustain the objection.

Dr. Washington West, a practising physician, who had made an examination of the appellee testified he had examined the left shoulder of the appellee and the region around it and found a fracture of the left clavicle at the end toward the shoulder and had found some displacements and shortening of the bone that, in his judgment was permanent.

The witness was then asked whether the condition of that part of the shoulder was likely to interfere with the use of the arm and shoulder. He was also asked if, in his judgment, an injury of the character he found would probably result from being seated in a vehicle struck by an automobile and the person being thrown to the ground. To each of these questions general objections were made and overruled. It is argued the questions were improper because they were not based on the evidence. Counsel for the appellant cite the case of Hammond v. The Bloomington Canning Co., 190 Ill. App. 511. In that case the Appellate Court held that a hypothetical question should have in it all the facts that the plaintiff claims the evidence proves his condition to have been.

It will be observed the first question asked Dr. West was not hypothetical and does not fall within the rule as to such questions.

The other question asked him came within the rules controlling such questions and should not have been permitted at the time it was propounded, if proper objection had been made, for the reason the doctor was the first witness called and there was nothing in the record on which to base the question. However, but a general objection was made and the evidence subsequently heard would have justified the question later in the case. The appellee testified she was seated in a vehicle which was struck by an automobile and she thrown to the ground and injured. This brought the question squarely within the rule above stated.

Under the assigned error that the verdict is against the weight of the evidence and that the damages are excessive the appellant insists the weight of the evidence did not show that the appellent was guilty of negligence nor that the appellee was using due care and that the damages awarded are largely in excess of all damages actually sustained. In support of his contention that the appellee was not using due care the appellant insists that it appears from the evidence that at the time of and immediately prior to the collision the appellee was lying in the seat in her vehicle and her horse traveling uncontrolled along the center of the road.

The only eyewitnesses to the transaction were the appellant and the appellee.

The appellee testified she was sitting in the seat on her vehicle traveling south on the west side of the road and saw the appellant at a distance of a hundred feet or more coming to-

ward her at a speed of about twenty miles an hour and that when about seven feet from her he turned to the left and ran into her vehicle. Two other witnesses testified that on the day following the appellee's vehicle was lying on the west side of the road.

Dr. West, in answer to the hypothetical question before mentioned, answered that the injury might have been occasioned under the circumstances detailed in that question.

The appellant testified he was traveling about fifteen miles an hour on the east side of the road and saw the appellee's horse when he was about one hundred feet from it and as he approached appellee's vehicle was near the center of the road and he saw her for the first time when she was less than fifteen feet from him and that she was lying in the seat, that when he saw her he put on his break and tried to pull out of the way but there was no room and the machine hit the wagon. One other witness testified he met the appellee between a quarter and a third of a mile from where the collision occurrd and that she was lying in the seat on her vehicle.

The above is the substance of all the testimony bearing on the questions of care on the part of the appellee and negligence on the part of the appellant.

As to the extent of the appellee's injuries she testified she fell on her left shoulder and was bruised both on the front and back of her shoulder and down the left side to her knee. She further testified she was taken to a doctor, by the appellant, and that the doctor bandaged her and that she kept the bandages on about eight weeks, that she made four trips to the doctor, that for the first three nights she did not sleep and suffered great pain, that up to the time of the trial, at times, she suffered severe pains, that for six months she was unable to attend to her work of gardening and flower raising and could do very little work of any kind and that since the injury she cannot raise her left arm up, that before the injury her shoulder was straight and that now there is a bone sticking up. In addition to her testimony she exhibited her shoulder to the jury.

Mary Sautier testified she saw the appellee while her arm was tied up and examined her shoulder and side and said she was bruised about the shoulder and down the left side to her knee.

Dr. Carl Conway testified to an Xray examination and gave a description of the injured parts substantially as given by Dr. West.

The foregoing with the testimony of Dr. West stated at another place in this opinion was before the jury tending to prove the extent of the injuries of the appellee. The injuries to appellee's vehicle did not exceed $12.50.

Under the law it was the duty of the jury, under proper instructions as to the law, to determine whether the weight of the evidence showed that the appellee, while exercising due care for her personal safety, had been injured by the carelessness or negligence of the appellant and also to determine the amount of damages, if any, the appellee was entitled to receive. In determining this question by a court of review before it will assert its judgment it must be taken into consideration that the jury and the trial judge saw the witnesses and heard them testify and that the verdict of the jury and the action

of the trial judge in denying a motion for a new trial, where the same questions are presented, are the acts of persons having a superior opportunity to determine the weight to be given the different witnesses testifying in the case. This is a rule frequently applied and in the absence of other errors in the record a verdict will not be disturbed unless it appears manifestly against the weight of the evidence or the result of passion or prejudice, neither of which conditions appears in this record.

Finally it is complained that the court erred in refusing each of the instructions offered by the appellent and refused by the trial court. Three instructions were given to the jury at the request of the appellant and six instructions offered by him were refused. None were offered by nor given on behalf of the appellee.

In the appellant's given instructions reasonable care and the term accident were defined and the jury instructed that if the appellee was injured as the result of an accident or while the appellant was exercising reasonable care they should find the appellant not guilty and that before the appellee could recover she must prove by the greater weight of the evidence that the appellant was guilty of negligence as charged in the declaration and that such negligence was the proximate cause of the injury complained of and that she was not guilty of negligence directly contributing to the injury and if she failed to prove either of these propositions by the greater weight of the evidence they must find the appellant not guilty.

Appellant's refused instruction number one was a statement of the rule as to the burden of proof, the third that the appellee must prove the appellant was guilty of negligence that caused the injury, the fourth that if the appellant was using due care there could be no recovery and the sixth that the negligence of the appellee contributing to the injury would bar a recovery. These instructions were but restatements, in different language, of the rules of law contained in the appellant's given instructions and it was not error to refuse them.

Appellant's second refused instruction was based, on the proposition that the failure of the appellee to have lights on her vehicle might be considered as a bar to a recovery. What has been said in another part of this opinion is sufficient answer to this contention.

The fifth instruction offered by the appellant and refused by the court would have informed the jury the appellee's testimony had no greater weight and was no more trustworthy than the testimony of the appellant, merely because she was a woman, unless the evidence proved circumstances which would warrant the jury in giving greater credibility. While this instruction is open to other criticism it is sufficient to say the court did not err in refusing it under the rule announced in Helbig v. Citizen's Ins., Co., 234 Ill. 251.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported.

Term No. 50. Agenda No. 53.

In The

APPELLATE COURT, FOURTH DISTRICT.

October Term, A. D. 1919.

M. H. BOALS PLANING MILL COMPANY, Appellee, vs. CLEVELAND, CINCINNATI, CHICAGO and ST. LOUIS RAILROAD COMPANY, Appellant.	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY.

MAR 25 1920

216 I.A. 654

Eagleton, J.

This case was before this court at a former term and at that time was reversed and remanded for a new trial, the opinion being published in Volume 211 on page 125 of the Appellate Court reports. A statement of the facts will be found in that opinion.

When the case was redocketed in the Circuit Court and the cause again tried a verdict for $19,000.00 was returned in favor of the plaintiff on which, after a motion for a new trial had been overruled, judgment was rendered and from that judgment the defendant prosecutes this appeal.

The errors assigned and discussed in appellant's argument are that the verdict is manifestly against the weight of the evidence; that the court erred in refusing to allow the appellant to file an additional plea after the case was redocketed and prior to the beginning of the trial; that the court erred in permitting the appellee to read the testimony of one Herbert Weindel as given by him on the former trial; that the court erred in certain rulings on the admission and exclusion of evidence and that the court erred in giving certain instructions offered by the appellee and in refusing certain instructions offered by the appellant.

After the case was redocketed in the Circuit Court the appellant asked permission to file an additional plea which set forth in apt terms that certain insurance companies had paid the appellee, prior to the beginning of the suit, the full value of all property mentioned in the declaration, which was damaged or destroyed by fire and that said insurance companies had been subrogated to all rights of the appellee. The court denied the motion of the appellant.

The rule recognized in this state is set forth in the case of Pontiac Fire Insurance Company v. Sheibley 279 Ill. 118 as follows:

"Where a loss by fire had been caused by the action of a wrong doer and the insurance company had paid the loss it cannot maintain an action in its own name against the wrong doer. The suit must be brought in the name of the property owner, for the use of the insurer."

While the suit must be brought in the name of the property owner for the use of the beneficial plaintiff, it is not a matter of concern to the defendant that the name of the usee be used. The use of the name of the beneficial plaintiff is for

the protection of such plaintiff. The usee or beneficial plaintiff need not be named in the record at all. The addition of the name of the latter is to enable him to protect his interests as against the nominal plaintiff. (Foreman Shoe Company v. Lewis and Co., 191 Ill. 155; Zimmerman v. Wead 18 id 305; American Express Co., v. Haggard 37 id. 465; Tedrick v. Wells 152 id. 214; Hobson v. McCambridge, 130 id 367.)

From these authorities the court did not err in refusing permission to file the plea.

On the trial the appellee was permitted, over the objection of the appellant, to introduce the evidence of one Herbert Weindel as given at a former trial of the case. Weindel was with the American Forces in Europe at the time of the trial and no effort was made to get his deposition nor was an affidavit filed for a continuance setting forth what the appellee expected to prove by him. It is argued that the deposition could not have been procured. In Miles v. Danforth 32 Ill. 59, the witnesses were in the Union Army and an affidavit was filed showing a commission had been sent out to take their depositions. This was held to be sufficient grounds for a continuance and the case was reversed because the court erred in refusing to continue the case and the court said:

"We will not now say that no effort need be made to procure the testimony of witnesses thus situated, but we may safely say that very little probability exists that it is possible to get the testimony of soldiers in the field engaged in an active campaign, as we know this army had been. At any rate, the efforts in this case we deem sufficient."

"Mere absence from the jurisdiction at the time of the trial is a disability by no means equivalent to death, with out affirmative evidence that a fruitless search has been conducted in good faith and with due diligance, and that from ignorance of the witness' whereabouts or other reasons, his deposition could not have been taken."

16 Cyc. p. 1098.

In the I. C. R. R. v. Ashline, 171 Ill. 313 the rule is laid down as follows:

"What a deceased witness, or a witness beyond the jurisdiction of the court whose deposition cannot be procured, may have testified to on a former trial between the same parties may be proven by any person who may have heard and could remember the evidence."

While an effort to take the deposition of the witness might have been fruitless it would have furnished a foundation for proper proof of what the absent witness testified on the former trial but without that effort the court erred in admitting the evidence.

It is also urged that the court erred in permitting W. J. Boals, who was secretary and treasurer of the appellee to give certain testimony on the trial. This witness was handed some typewritten sheets warked, "Plaintiff's Exhibit 1-A, being copies of lists of buildings, machinery and stock. The original list of the building was made by the witness and he assisted in making the original list of the stock. The list of the machinery was made by Lutz, Crotes and Shassare. The witness testified he was familiar with the machinery listed and inspected the list after it was made and checked it all over. He

does not, however, state that the list as checked by him was a correct list of the machinery claimed to have been destroyed. It appears that the original lists made had been copied and the originals were pencils and were lost or destroyed and the copies were used on the trial. The witness testified the copies were correct copies of the original.

The witness was then asked if by reference to the lists he could remember the items of machinery on the first floor and likewise as to the machinery on the other floors and asked if he could remember, by reference to the lists, the machinery on the various floors. To these questions the witness replied in the affirmative and was thereupon permitted to refer to the copies and testify as to what machinery was in the building.

The rule is that a witness may use a memorandum to refresh his memory but must be able to say after reference to the memorandum that he remembers the facts about which he testifies. Diamond Glue Co., vs. Weitzychowski, 227 Ill. 338. The testimony of this witness brought him clearly within this rule and the court did not err in permitting his testimony to go to the jury.

J. C. Woolner and U. S. Nixon were called as witnesses by the appellee as to the value of the planing mill before and after the fire. It is argued they were incompetent to give opinions as to such values. As no objection appears to have been made to the testimony of Nixon it will not be necessary to consider his evidence. Woolner gave his occupation as treasurer of a construction company and that he had been acquainted with the planing mill in question for many years and that the company with which he was employed was engaged in general contracting and building anything up to an industrial plant and that he was acquainted with the fair, cash, market value of the planing mill in question just before the fire and just after it had burned. A general objection was made to the witness giving his opinion as to the values and it was overruled. The court did not err in this ruling.

The third instruction given by the court at the instance of the appellee informed the jury that it is a rule of law that affirmative testimony is of greater weight, where the credibility of the witness is otherwise equal, than is negative testimony and that the jury might consider this rule in determining the weight to be given the testimony of witnesses who said sparks were emitted from the appellant's engine and the weight to be given the testimony of witnesses that they did not observe or see sparks coming from such engine. The effect of this instruction was to tell the jury that the testimony of witnesses who said sparks were emitted from the appellant's engine was entitled to greater weight than the testimony of witnesses who said they did not see such sparks. The hypothesis of equal opportunity was omitted and the tendency was to invade the province of the jury. It is for the jury to determine the weight to be given the testimony of the witness. In the case of Rockwood v. Poundstone, 38 Ill. 199 the Supreme Court said:

"It is not true that affirmative testimony is to be preferred before negative testimony, so called, under all circumstances ——————. The value of all testimony is to be ascer-

tained by the jury by weighing it and to find whichever way it may preponderate."

To the same effect is the case of L. N. A. & C. Ry. Co. v. Shires, 108 Ill. 617.

Appellee's fifth given instruction informed the jury that while the plaintiff must prove by the preponderance of the evidence that the defendant's engine set the fire in question that proof might be made by proof of facts and circumstances from which it could be inferred that such engine did set the fire in question. While such fact might be proven by circumstantial evidence it must be proven and is not a matter to be determined by conjecture or speculation. It might be inferred that the fire was so started and yet that fact not be proven as required by law, for this reason, it was improper to give the instruction.

A portion of appellee's sixth given instruction is set off by quotation marks. While it may not always be improper to write a word, phrase or sentenence in an instruction in quotation marks, yet in the instruction under consideration, even though of itself it is not considered as reversible error, it should have been avoided.

Appellee's seventh given instruction directs a verdict in favor of the appellee if it proved its case by a preponderance of the evidence. The instruction omits all reference to the defense offered that appellant's locomotive engine was equipped at the time with the most approved appliances in general use among railroads to prevent the spread of fire therefrom. This was an affirmative defense made by the appellant and a large amount of testimony was introduced for the purpose of showing the equippment used. Under the instruction as given no matter what the equipment the jury was directed to return a verdict if the appellee proved its case by a preponderance of the evidence as laid in the declaration. There was no averrment required in the declaration negativing the equipment of the engine nor was any necessary and it was error to give this instruction.

As the case will have to be tried again no opinion will be expressed as to the weight of the evidence.

For the reasons given the judgment of the trial court is reversed and the cause remanded for a new trial.

Reversed and Remanded.

Not to be reported.

Term No. 53. Agenda No. 19.

In The

APPELLATE COURT OF ILLINOIS. 216 I.A. 654

Fourth District.

October Term A. D. 1919.

ILLIO SIMINOFF Appellee vs. NICK ALABACH, Appellant.	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY.

Eagleton J.

This is an appeal prosecuted by Nick Alabach from a judgment rendered against him by the Circuit Court of Madison County in favor of Illio Siminoff for the sum of $590.18 and costs.

The case was twice tried in the Circuit Court. The first time by a jury of six men and a verdict for $500.00 returned in favor of the appellee which was set aside on motion of appellant and a new trial awarded. On the second trial a verdict of $590.18 was returned in favor of the appellee and the appellant entered a motion for a new trial which was overruled and judgment entered.

The contention of the appellant is that the verdict is against the weight of the evidence. No other question is raised.

In 1910 or 1911 one K. A. Mitsareff, a Bulgarian, was convicted of murder and sentenced to the Southern Illinois Penitentiary. For sometime prior to June, 1915, friends of Mitsareff had been making an effort to get him released on parole and had employed one F. A. Garesche, an attorney at Madison, Illinois, to procure his release, and had agreed to pay him $500.00 for his services.

On the 8th of June, 1915, Siminoff accompanied by the appellant and Dr. Christo Theodoroff, went to St. Louis and drew $500.00 from a bank and returned to the Tri-city State Bank at Madison, where the $500.00 was deposited to be paid to Garesche when Mitsareff should be released from the penitentiary. A certificate of deposit was issued by Hunter Riley, assistant cashier of the bank and on the following day R. B. Studebaker, the cashier, discovered the certificate did not conform with the contract with Garesche and he called the parties in and took it up and issued another. On June 21, 1915, Mitsareff having been released from the penitentiary the $500 was paid by the bank to Garesche on the order of Dr. Theodoroff.

The suit was begun October 4, 1917. A declaration consisting of common counts was filed and later a bill of particulars was filed in which it was stated the money sued for was $500 advanced by the plaintiff to the defendant on or about June 8th, 1915.

The parties and all witnesses, except R. B. Studebaker, are Bulgarians. The appellee is unable to read the English language while the appellant and Dr. Theodoroff appear to have a better knowledge of the English language than any of

the others of their countrymen participating in the case.

On the trial Siminoff testified he loaned the money to the appellant and Dr. Theodoroff, that when they arrived at the bank with the money he handed it to Alabach, who handed it to the bank official and received a writing which he handed to the appellee and told the appellee it was a good paper—to keep it. That thereafter Alabach and Theodoroff took him to the bank and he gave Alabach the paper he had received and Alabach gave him another which the appellee identified and introduced in evidence.

This paper was a receipt by the Tri-City State Bank to Nick Alabach, Elia Strezoff, Dr. Theodoroff and A. Mitsareff for $500 "to be held in escrow as per contract entered into between the above mentioned parties ———————— and F. A. Garesche ————————."

The appellee further testified that the first paper the appellant gave him looked like a note or check, that he could not read it but that appellee's name was no the top of the paper, then Dr. Theodoroff's name and then the name of the appellant and that he showed the paper to George Namnoff and Karo Namnoff. George Namnoff testified the appellee showed him a paper with $500 in the upper left hand corner and Theodoroff's and the appellant's names thereon. Karo Namnoff testified the appellee showed him a paper in June, 1915, that it was note paper with $500 in the upper left hand corner and below that was appellee's name, on the next line five hundred dollars, in writing, then "fifteen days after Mitsareff comes out of the penitentiary" appellee gets the money. That Theodoroff's name was on the side and the appellant's name on the bottom.

The foregoing is the substance of the evidence offered by the appellee.

The appellant and Dr. Theodoroff, who did not appear in court to testify but whose deposition was read in evidence, each testified that they did not jointly or severally borrow the money or give the appellee a note therefor.

The appellant testified that there had been some talk about raising money to procure the release of Mitsareff and that it would take $300 and that he heard the appellee express a willingness to furnish that amount and that the appellee said he knew Mitsareff had money in a bank in New York City and that he would refund it with a premium. He further stated he and the appellee were from the same town in Macedonia and were friends and that the appellee asked him to go with him and Theodoroff to deposit money in the bank and that pursuant to that request he accompanied them and that the appellee transacted the business with the bank.

Dr. Theodoroff testified that he and the appellant were witnesses to the transaction between the appellee and the bank. He also stated that on many occasions the appellee told him he liked Mitsareff and wished to help him get released and that the appellee told him that the father of Mitsareff had promised to get the money as soon as the son was released.

T. B. Markoff, Mike Strezoff and M. Eckoff, each testified to conservations, on different occasions, with the appellee in which the appellee said Mitsareff owed him the money for procuring the release of the younger Mitsareff from the penitentiary. In some of these conversations it appears the ap-

pellee referred to the elder Mitsareff while in others it was the son.

The two certificates of deposit issued by the bank were introduced in evidence, one bearing date June 8, 1915 and the other June 9, 1915. In each of these certificates appear the names of Elia Strezoff, Dr. Theodoroff and the appellant as depositors and in the first the name of Garesche appears as one of the depositors while in the other A.Mitsareff is named as one of the depositors.

R. B. Studebaker testified that the man he knew as Elia Strezoff was in the bank on June 8 and June 9 and other witnesses testified that the appellee was known as Strezoff.

It appears in the testimony of the appellee that about one year after depositing the money he went to Akron, Ohio, where he engaged in the baking business in partnership with Alabach and two others and remained in Akron about one year. He also testified that the first time he asked the appellant for this money was when he returned from Akron and that the appellant chased him out of the house.

The foregoing is the substance of the testimony of each of the witnesses and while due consideration must be given to the fact that the jury that returned the verdict and the trial judge who denied the motion for a new trial and entered judgment on the verdict saw the witnesses, except Dr. Theodoroff, and heard them testify, an examination of the record shows that the verdict of the jury and the judgment thereon are so clearly against the weight of the evidence that it is the duty of this court to reverse the judgment of the trial court and remand the cause for a new trial.

For the reasons indicated the judgment of the trial court is reversed and the cause remanded for a new trial.

Reversed and Remanded.

Not to be reported.

Term No. 59. Agenda No. 56.

In The

APPELLATE COURT, FOURTH DISTRICT.

October Term, A. D. 1919.

J. E. PAYNE, Appellant, vs. PEARL PAYNE, Appellee.	APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY.

216 I.A. 654

Eagleton J.

Jacob Lancaster and Frank L. Gordon were the owners of one hundred forty acres of land in Clay County, Illinois, subject to a mortgage held by one William Pixley.

About March 1, 1918, the appellant, J. E. Payne, as the agent of Lancaster and Gordon leased about twenty or twenty one acres of this land to the appellee, Pearl Payne, to be planted in corn, Lancaster and Gordon to have as rental one third of the corn raised. The appellee took possession of and planted said portion of said lands in corn.

Lancaster and Gordon desired to dispose of the land and made an agreement with the appellant that if he would sell the land for them that he could have the rental from the portion of the land leased to the appellee as compensation for his services in making such sale and for other services theretofore rendered by him for them. Thereafter the appellant procured a sale of said lands to Pixley and the premises were conveyed by Lancaster and Gordon to Pixley by warranty deed dated October 14, 1918. On the same day Pixley entered into a contract with the appellee to sell to the appellee seventy acres of said lands, which included the lands theretofore leased by Lancaster and Gordon to him for $1,400.00 to be paid on or before October 14, 1921. In this contract it was further provided that the appellee should have control of said seventy acres of said land during the life of the contract and should pay all general and special taxes then or thereafter levied against said land and should pay Pixley 7% interest per annum payable annually on said sum of $1400.00.

On November 20, 1918, the appellant issued a distress warrant pursuant to which the Sheriff of Clay County levied upon took possession of two hundred thirty seven shocks of corn raised by the appellee during the year of 1918 on said leased land.

After the levy under the distress warrant a trial was had before a justice of the peace and an appeal was prosecuted from the judgment of the justice of the pease to the circuit court where, a jury being waived, the cause was tried by the court and the issues found in favor of Pearl Payne, the appellee, and a judgment rendered accordingly and this appeal is prosecuted from that judgment by J. E. Payne.

There was evidence introduced on the trial for the purpose of showing that the appellee took the contract for the conveyance of the land under an agreement that the rent was reserved and that the appellant was to get the same.

Several witnesses were called by the appellant who testified to certain conversations with the appellee which tended

to show there was such an agreement while the appellee testified there was no such agreement and denied the conversations. This fact is presented by the appellant on the proposition that the findings are against the weight of the evidence.

There is, however, another question that will be first considered and that is as to the right of appellant to maintain the action.

The deed from Lancaster and Gordon to Pixley contained no reservation whatever as to rentals nor was it proven that Pixley agreed to a reservation of the rentals. He testified he made the purchase of the land from Lancaster and that "There was no reservation of rents by Mr. Lancaster, at the time of making the deed and I made no reservation of crops or rents of the farm at the time I sold it to Pearl Payne."

Under these circumstances unless explained by the evidence the rental to accrue passed by the deed to Pixley and under Pixley's evidence they passed to the appelle.

It is true that an agreement might have been made whereby the appellant would be entitled to the rent and yet not have the right to distrain.

It will be observed that the appellant had no interest in the land and the relation of landlord and tenant did not at any time exist between him and the appellee. The appellant at most was only the assignee of the rent. The Statute provides that the landlord may seize for rent the personal property of the tenant and while this may be done by an agent or an attorney it must be the act of the landlord. (Revised Statute J. & A. Chap. 80 Sec. 7054).

Under the Statute this right extends to the grantee of any landlord (Revised Statute J. & A. Chap. 80 Sec. 7052) but a mere transfer of the rent remaining unpaid, which is only a transfer of a chose in action, does not carry with it the remedy by distress (Taylor's Landlord and Tenant, 9th Ed., Sec. 568.)

The distress warrant issued by the appellant recited that the appellee was indebted to the appellant in the sum of $300.00 for one years rent for premises demised by the appellant as agent of Lancaster and Gordon. After the evidence had been heard in the court below and the court had announced its decision the appellant asked leave to amend by substituting Lancaster and Gordon as plaintiffs in lieu of the appellant. This motion was denied by the court.

It appeared from the testimony that Lancaster and Gordon claimed no interest in the rent. It also appeared that the relation of landlord and tenant had ceased. Under these conditions whatever right they may have had to distrain if the relation of landlord and tenant had continued had passed from them. From what had been said it is clear that the trial court did not err in denying the motion to amend nor in the judgment rendered.

There are questions raised about certain propositions offered by the appellant to be held by the trial court as the law applicable to the case and also as to the weight of the evidence but from the holding of this court it will not be necessary to discuss those questions.

Finding no substantial error in the record the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported.

Term No. 64. Agenda No. 54.

In The

APPELLATE COURT, FOURTH DISTRICT.

October Term A. D. 1919.

MAR 2

MABEL M. LINK, Administratrix of the Estate of GEORGE L. LINK, Deceased, Appellee. vs. ALTON, GRANITE CITY, AND ST. LOUIS TRACTION COMPANY, Appellant.	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY.

216 I.A. 654

Eagleton, J.

On December 25, 1915, the appellant was engaged in operating an electric railroad between East St. Louis and Edwardsville, Illinois, which line of railroad passed through Mitchell, Illinois.

A short distance south of Mitchell is a public highway crossing the track of appellant. On the south side of the highway and about fifty feet east of appellant's track was located a saloon run by George J. Hohen and Frank Hachenthal. About ten feet east of the east side of the track and one hundred seventy feet south of the crossing was a waiting shed provided by appellant for the accomodation of passengers.

The track of appellant runs practically south from the crossing to a point about one hundred feet south of the waiting station at which point the track makes a gradual curve to the west.

The cars on appellant's track were run by an overhead trolley suspended from poles on either side of the track. These poles were placed about one hundred feet apart parallel with the track and the poles on the east side of the track were from five to six feet from the east rail of the track while those on the west side of the track appear to be some twenty five feet west of the west rail. There are two trolley poles on the east side of the track between the waiting room and the crossing, one being about fifty feet north of the waiting room and the other about twenty five feet south of the crossing. Some apple trees were standing south of the saloon some forty or fifty feet from the track.

George L. Link had been engaged in farming for fifteen years or more in the neighborhood of Mitchell and for a long time had been well acquainted with the crossing in question having frequently been around the place of business of Hohen and Hackenthal and over and across the crossing in question. He was fifty three years old and his hearing and eyesight good. On the day mentioned Link and Charles W. Smith went to the saloon of Hohen and Hackenthal sometime between 9:30 A. M. and 10:30 A. M. where they remained till about 12:30 P. M. or 12:45 P. M. While there they engaged in a game of pinochle and had several drinks of intoxicating liquor.

They were traveling in an open buggy drawn by a team of mules, and when they left the saloon George J. Hohen accompanied them out of the saloon and saw them drive toward the

crossing. In passing over the crossing a car operated by the appellant struck Link and Smith, both of whom received injuries from which they died.

The appellee, having been appointed administratrix of the estate of George L. Link, brought this suit. There have been three trials. On the first trial the jury failed to agree. The second trial resulted in a verdict in favor of the appellee for $5000.00 on which judgment was rendered and on appeal to this court at the March Term, 1918, the judgment reversed and the cause remanded for a new trial. The cause being redocketed in the Circuit Court a new trial was had resulting in a verdict in favor of the appellee for $8100.00 on which judgment was rendered from which this appeal was prosecuted.

Originally there were four counts in the declaration but two were dismissed. In one of the counts on which the case was tried the appellant was charged with running its car at a dangerous rate of speed and the other charged that it was running its car at a dangerous rate of speed without giving reasonable notice or warning as it approached the crossing in question.

When the case was reversed by this court and the cause remanded for a new trial the reason given for the reversal was that the weight of the evidence did not show that appellee's intestate had used due care for his personal safety at the time of and immediately preceeding the injury that resulted in his death. The same question is presented on this record. Many witnesses were called by each of the parties who testified as to the collision and to facts and circumstances occuring at the time of and preceeding the accident and as to obstructions to a view of the railroad track along which the car traveled in approaching the crossing where the injury occurred.

As to the giving of signals or warning of the approach of the car of appellant at the crossing the undisputed evidence shows that one J. B. Granger was walking south on the track in question toward the crossing and saw the car approaching when he was some distance from the crossing, that the car began whistleing and that he continued walking down the track till he got near the crossing and about ten feet from the team driven by the deceased and that the car continued whistleing. That when he was about thirty feet from the team he put his hand about his mouth and hallooed to Link but that Link paid no attention to him. That he ran up in about ten feet of Link and called to him, "Look out, you will get hurt." but that Link did not heed him. This witness also testified that he did not see them look down the track. The testimony of this witness is corroborated by a number of witnesses called by the appellant. While some of the witnesses called testified they did not hear the signals given it is clear from reading the record that the preponderance of the evidence did not show a failure of appellant to give warning of the approach of the car.

The appellee took the position on the trial of the case and now argues that there were obstructions that prevented persons approaching the crossing seeing cars coming from the south. A number of witnesses were called by her who testified that the trolley poles and waiting station of appellant were so situated that from certain positions they formed a continuous

barrier to a view of the track of appellant south of the crossing. This testimony is supplemented by numerous photographs offered in evidence by the appellee. Among these pictures are four taken from positions in the center of the public road east of the crossing looking in a southerly or southwesterly direction. One of these was taken fifty seven feet east of the railroad track, one twenty three feet, one twelve feet and one nine feet.

The first picture shows the front of the saloon and the waiting room. The second shows the waiting room as completely obstructing a view of the track after a short distance south of the waiting room. The third shows the waiting room and the two poles north of the waiting room and the poles south of the waiting room on the east side of the track for considerable distance. In this picture it is clear that the only obstruction that could be said to interfere with a view of the track is the pole north of and near the waiting room on the east side of the track. The fourth picture shows the pole on the east side of the track and near the crossing as the only obstruction to a view of the track.

In none of these pictures do the poles and waiting room nor the poles alone form a continuous obstruction to a view of the track. At no place in the pictures does it appear that any two obstacles formed a continuous obstruction. On the other hand it is clear that a very slight change of position at any of the places from which these pictures were taken would show an unobstructed view of the track for a long distance.

On behalf of the appellant certain photographs taken from different distances along substantially the same line of travel were introduced. These photographs demonstrate what is apparent from those introduced by the appellee i. e. that the obstructions shown in the pictures offered by the appellee could only interfere to a limited degree at particular places with a view of the track and that for the greater portion of the distance from the saloon to the crossing a car could be seen for a distance of eight hundred feet or more.

As was stated in the opinion handed down when this case was in this court on the former occasion, "It is fundamental, so much so that it is unnecessary to cite authorities, that in cases of this nature the plaintiff must prove affirmatively that the injured party was in the exercise of ordinary care for his own safety at and immediately prior to the time of the injury."

For the purpose of showing that the deceased was using due care at the time of and immediately prior to the accident, George J. Hohen, one of the proprietors of the saloon, testified on the last hearing that the deceased as he left the saloon going toward the crossing traveled slowly, his team going in an ordinary walk about three miles an hour and that "as he traveled out from my place, Mr. Link was driving the team and looking south as he drove toward the crossing. He was about half way from the saloon to the track looking south."

The above was the only evidence offered to show what the deceased did in the way of looking for approaching cars while he was going from the saloon to the crossing.

In view of the fact that deceased was possessed of his faculties of sight and hearing and that he was well acquainted with the surroundings it cannot be said that the weight of the evidence shows that the deceased used due care for his personal

safety in going to the position in which he was injured. The facts in evidence force the conclusion that the deceased was not in the exercise of such care. It is argued by counsel for the appellee that inasmuch as two juries have found the issues in favor of the appellee a court of review should not disturb the judgment. This is a correct position as a general rule where the evidence is merely conflicting but when, as is this case, the surroundings are presented to the court in such a manner that the court can see the obstructions complained of, another question is presented. In Love v. McElroy, 118 Ill. App. 412, is a case that had been tried four times. At the first trial the jury disagreed. The jury returned a verdict for the plaintiff on the second trial and a new trial was awarded by the trial court. The case was again tried and a verdict returned for the plaintiff and on appeal that judgment reversed with a finding of fact. On page 419 the Appellate Court in an opinion by Mr. Justice Farmer held:

"While great weight is and should be given to the verdict of juries and they should not be set aside by an appellate tribunal if they can be reasonably sustained, and especially when, as in this case, there have been several verdicts the same way, yet when clearly and palpably against the weight of the evidence, justice requires that they be not approved. Where the evidence is merely conflicting, even if doubtful whether the verdict is supported by the evidence as gathered from reading the record, appellate courts are inclined to sustain it—————————————. But where, as here, the oral testimony in behalf of the defendant below is supplemented and corroborated by documentary exhibits which we have seen and examined, no doubt is left in our minds that the verdict is manifestly contrary to the weight of the evidence."

For the reasons indicated the judgment of the trial court is reversed.

Reversed.

Finding of fact: We find that the deceased did not use due care for his personal safety in going to and placing himself in the position in which he was when struck by appellant's car.

Not to be reported.

Term No. 10 Agenda No. 12

October Term, 1919.

The People of the State of Illinois, Defendant in error v. Joe Kuca, Plaintiff in error	Error to County Court of Franklin

Opinion by Higbee, J.

MAR 25

216 I.A. 655

By an information filed in the county of Franklin county, plaintiff in error was charged with selling intoxicating liquor in the town of Franklin, while the same was anti-saloon territory. The information contained eight counts. The jury returned a verdict of guilty on each of the counts. The court arrested judgment on count four, sentenced plaintiff in error to serve fifteen days in jail on each of the first three counts, and assessed fines aggregating $140.

The only evidence produced by the People on the trial was the testimony of one witness, Pete Schroers and the certificate of the clerk of the town of Franklin, certifying that said town was anti-saloon territory. The witness Schroers testified he purchased whiskey of plaintiff in error on numerous occasions during the months of June, July, August and September, 1918; that he saw various other persons purchase whiskey and beer from him during that time; and that he assisted plaintiff in error to move two barrels from the depot to his "beer house" back of his store.

The only evidence offered by plaintiff in error was his own testimony. On direct examination he testified that he used the "beer house" as a store house for potatoes, flour, etc. He denied that he sold the witness Schroers, intoxicating liquor during the months of June, July, August or September, 1918. He was not asked on direct examination if he sold to any other person. On cross examination he was asked if he sold whiskey or beer to any one during the month of June, 1918, and if he did not have a special revenue stamp or receipt as a retail liquor dealer. To the first question he replied in the negative, and to the second in the affirmative. Objections to both of these questions on cross examination were overruled by the court. The action of the trial court in overruling these objections and the question of the sufficiency of the evidence to support the verdict are the grounds upon which a reversal of the judgment is urged.

It is true that a defendant when introduced as a witness in his own behalf is to be examined and cross examined precisely as other witnesses, and his cross examination must be limited to the matters brought out in chief, but in our opinion this cross examination was not a violation of that rule. He was not cross examined upon any subject not connected with the offense charged. "So far as concerns questions touching the merits, the defendant, by making himself a witness, as to the offense, waives his privileges as to all matters connected with the offence. It has been ruled also, that to affect his credibility, he may be asked whether.....he has been concerned in other crimes, part of the same system." Spies v. The People, 122 Ill. 1. Wharton on Criminal Evidence, sec. 432. While the

sales testified to by the witness Schroers were flatly denied by plaintiff in error, yet the evidence shows that during the time mentioned the latter had in his possession at least fifteen gallons of whisky, and also had a special revenue stamp or receipt, as a retail liquor dealer. We have held that the possession of this stamp or receipt was not improperly shown and proof of that fact is prima facie evidence of the sale of intoxicating liquor. Rev. Stat. sec. 17, chap. 43; People v. McBride, 234 Ill. 146. This proof clearly sustains the charge and the sentence under the proof does not seem to be excessive. No complaint is made of the giving or refusing of instructions.

The verdict being sustained by the evidence and no error appearing on the record the judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 13. Agenda No. 30.

October Term, 1919.

The People of the State of Illinois, Defendant in Error vs. John B. Harris, Plaintiff in Error

~~Plaintiff in Error.~~ Error to Madison.

FILED MAR 25 1920

216 I.A. 655

Opinion by Higbee, J.

Plaintiff in error was indicted on a charge of conspiracy by the grand jury of Madison county, November 23, 1917. It appears that one John Papp had previously been indicted for incest with his daughter Anna Papp, and had employed plaintiff in error as his attorney to defend him against this charge. The indictment against plaintiff in error consists of four counts, and in substance, charged that he and John Papp feloniously conspired together on October 19, 1917 to "solicit, entice, persuade and induce one Anna Papp to absent, keep and secrete herself out of and away from the jurisdiction of the city court of Granite City" and not appear as a witness upon the trial of John Papp under the indictment for incest then pending against him in that court. The jury found plaintiff in error guilty, but did not fix any punishment by the verdict. Motions for new trial and in arrest of judgment were overruled, and plaintiff in error was sentenced by the court to pay a fine of $250.

It is urged by plaintiff in error that the judgment in this case must be reversed because the jury failed to fix the punishment, because the verdict is contrary to the evidence and because the trial court erred in ruling on the admissibility of evidence. As we must reverse the judgment for the first of the above reasons, we do not deem it advisable to discuss the weight of the evidennce. It is contended by plaintiff in error that the Parole Act applies only to cases in which the minimum term of imprisonment is one year, and that inasmuch as no minimum term of imprisonment for the crime of conspiracy is fixed by the statute, the Parole Act has no application to this case and therefore the jury should have fixed the punishment. It is the contention of defendant in error that the Parole Act was so changed by the amendment of 1917 that it now applies to the crime of conspiracy and that under it the jury had no power to fix the punishment. We hold the opinion that the case of People v. Moses, 288 Ill. 281, decided since this case was tried below, is decisive of the question raised here. In that case the supreme court said in reference to the Parole law of 1917, "Section 1 of the act provides that the jury shall fix the punishment for the offenses of misprison of treason, murder, rape or kidnapping and section 2 provides that except for crimes enumerated in section 1 every sentence to the penitentiary shall be a general sentence of imprisonment and the court imposing the sentence shall not fix the limit or duration of the imprisonment. The punishment fixed by the criminal Code for the crime of conspiracy is imprisonment in the penitentiary for not more than five years or a fine not exceeding $2000 or both. The unit of time in the law is one day, unless there are hostile claims requiring a division of the unit for the

purpose of settling relative rights. The punishment prescribed by the Criminal Code is therefore imprisonment for a minimun time of one day and maximum of five years. While the general language of section 1 and 2 might be regarded as applying to all crimes, section 7 provides that no person sentenced under a general or interminate sentence shall be eligible to parole earlier than one year after commitment, nor until he or she shall have served the minimum term of imprisonment provided by law for the crime or offense for which he or she was sentenced. The general provisions of section 1 and 2 therefore cannot apply to the crime of conspiracy unless the Parole Law amended the criminal code by increasing the minimum term of imprisonment to one year or one convicted of that crime is eligible to parole the next day after his commitment. The first proposition is not within the purpose of any provision of the Parole Law and if adopted would render it unconstitutional and the second is contrary to the plainly expressed legislative intent. . . . One sentenced to the penitentiary under a general or indeterminate sentence cannot be released on parole until he has been confined in the penitentiary at least one year nor until he shall have served the minimum term of imprisonment provided by law for that crime. The two conditions must concur. One year of imprisonment must have been served in any case, and if the mimimum term of imprisonment provided by law for the crime exceeds one year the imprisonment must be for such minimum term. If the General Assembly had intended that a prisoner committed under a general or indeterminate sentence should be eligible to parole when he had served the minimum term of imprisonment prescribed by law for the crime of which he was convicted, a provision to that effect would have covered the entire subject annd there would have been no necessity for fixing the period of one year. The plain meaning of the Parole law is that the imprisonment shall be for at least a year, and if the minimum term fixed by law is more than a year the prisoner must serve that length of time before being eligible to parole. The Parole law of 1917 has not changed the term of imprisonment fixed by the Criminal Code for the crime of conspiracy. The court did not err in directing the jury to fix the punishment of the plaintiff in error nor in sentencing him to confinement in the penitentiary for a definite term of eighteen months, and the judgment is affirmed."

If it is not error to direct the jury to fix the punishment for conspiracy, it necessarily follows that it was error in this case for the jury to fail to fix it and for the court to do so. Defendant in error contends that since the crime in the case of People v. Moses, supra, was committed prior to the time the 1917 amendment took effect, what the court said in that case has no application to this case, but from the language above quoted it is clear the court did not base its decision on that ground, but held squarely that even as amended by the act of 1917 the Parole Act cannot be held to apply to the crime of conspiracy.

It is also insisted by plaintiff in error that the trial court's ruling on the admission and rejection of evidence was erroneous in several instances. We are of the opinion, however, that while the ruling of the court in one or more of the instances

named was not wholly free from criticism, yet there was no mistake made therein which would constitute reversible error.

The judgment will be reversed and the case remanded.

Not to be reported.

Term No. 14. Agenda No. 3.

October Term, 1919.

216 I.A. 655

J. A. DREW,
Appellee
v.
J. A. RITTER,
Appellant.

Appeal from
Richland

Opinion by Higbee, J.

On March 1, 1916, A. E. DeMange an attorney of Bloomington, Illinois, held the title to 163 acres of land in Richland county, consisting of 69 acres of apple orchard and 94 acres of farming land. This land had been occupied by appellant, J. A. Ritter, as tenant. On March 25, 1916, appellant and A. E. DeMange entered into a written lease of the land, providing, "A. E. DeMange of Bloomington, Illinois, the lessor, leases to John A. Ritter of Olney, Illinois, the lessee, (then follows a description of the lands), for the term of five (5) years, commencing on the first day of March, 1917, and ending on the 28th day of February, 1922. In consideration of said lease and the profits to be derived from the said tract of land by the said lessee, he, the said lessee, agrees to pay as rent for the said premises the sum of one thousand dollars ($1000) per year. Five hundred dollars ($500) on June 1st of each year during said term and five hundred dollars (500) on November 1st of each year during said term, for which said payments the said lessee agrees to execute and deliver to the said lessor his promissory notes on and dated March 1st of each year of said term for the two (2) payments to become due that year, which said two (2) notes for each of said years shall be made payable June 1st and November 1st, respectively, and shall bear interest at the rate of seven (7) per cent per annum after their respective maturities." After providing the manner in which appellant shall cultivate and handle the premises the lease contains the following: "The lessee agrees that the lessor may terminate this lease at any time by giving to the lessee at least sixty (60) days written notice prior to January 1st of any year, and in case of such notice, the lessee covenants and agrees to vacate said premises on January 1st next, following the giving of such written notice, provided, that if the lessee has expended money in the care of the orchard on said premises, in preparation for future crops, in excess of the value of the crops raised on said premises by the lessee, for the season preceding any such January 1st, then the lessee shall be paid the difference between the said sum of money so expended and the value of the crops raised for said season and the lessee in such case shall furnish to the lessor, a detailed itemized statement of money expended, and a detailed itemized statement of the value of the crops raised during such season, and in case of such sixty (60) days notice by the lessor to lessee to terminate this lease, the lessee covenants and agrees to vacate said premises without any further notice to vacate, and without any demand for said premises". These are the only provisions of the lease material to a consideration of this case.

Appellant held possession of the land under this lease until March 1, 1918, paid the $1000 rental therefor, and con-

tinued in such possession after March 1, 1918. He paid the rent due June 1, 1918 and on October 22, 1918 forwarded to DeMange a remittance covering the rent due November 1, 1918, which according to the terms of the lease paid the rent in full to March 1, 1919. This rental as the evidence shows, was accepted by DeMange and he never offered to refund any portion of it to appellant. Under date of October 25, 1918, DeMange sent appellant by registered mail notice to vacate the premises on or before January 1, 1919. Enclosed with the notice was a letter acknowledging receipt of the remittance for $500, "to cover the final payment of your rent for the season of 1918." This letter further stated that the reason for terminating the lease, was that DeMange had an opportunity to sell the farm upon condition that possession be given January 1, 1919, that he should know by the last of November whether the deal would go through, and if it did not he would withdraw the notice to vacate. On December 9, appellant wrote DeMange inquiring what had been done in the matter, and asking that he be informed whether he was "to stay another year or not." Under date of December 13 DeMange wrote it was very probably appellee would be required to vacate, and on December 26 wrote that it had been definately determined that he would have to vacate. During the season of 1918 appellant had sown the 94 acres of farming land to wheat, at an expense to himself, as he claims, of $1400. About August 1, 1918, appellee began negotiations with DeMange for an exchange of some land in Iroquois county, Illinois, for the land here involved. It appears from the evidence that the first knowledge appellant had of these negotiations was the notice sent him by DeMange on October 25. It also appears that DeMange knew nothing about the wheat sown by appellant until after the deal was consummated, while appellee admits he knew of the wheat being sown, but did not inform DeMange of that fact. There being some question concerning the title to the Iroquois county land, appellee and DeMange on December 23, 1918 entered into an agreement as follows: "This agreement executed this 23rd day of December, 1918, J. A. Drew of Olney, Richland county, Illinois, the lessee and A. E. DeMange of Bloomington, Illinois, the lessor, Witnesseth: That pending the negotiations between the lessor and the lessee for an exchange of lands, and pending the period necessary to remove objections by the lessor to the title of the lessee's land in Iroquois county, Illinois, the lessee agrees to take possession of the lessor's farm of one hundred and sixty three (163) acres in Richland county, Illinois, described as follows: (describing it) and to occupy the same in place of J. A. Ritter, the present tenant, from and after January 1, 1919, the lessee's possession and occupancy to be controlled by all of the terms and provisions of the existing lease between the lessor, A. E. DeMange and the said J. A. Ritter, the lessee to pay the same rent, towit, one thousand ($1000) dollars per year, as provided and in the manner specified in the said lease of A. E. DeMange to J. A. Ritter. In the event that the lessor conveys to the lessee the said one hundred and sixty three (163) acres, hereinabove described, the lessee to pay said rent proportionately only to the date of conveyance."

On December 30, 1918, appellee received notice in writing from appellant to the effect that appellant had learned appel-

lee had purchased the farm and notifying appellee that appellant claimed to own the wheat crop sown and that unless appellee and DeMange in some manner recognized such ownership in writing, he would refuse to surrender possession of the farm. It seemed that at some time appellant also notified DeMange to the same effect. Appellee did not receive a deed to the land until January 17, 1919. On January 2, 1919, appellee made written demand on appellant for possession of the farm and upon appellant's refusal to surrender possession, appellee instituted an action in forcible entry and detainer before a justice of the peace, on January 6, 1919. A jury in the justice court returned a verdict for appellant and appellee appealed to the circuit court. At the close of all the evidence that court, on motion of appellee gave the jury a peremptory instruction to find for him. It is contended by appellant, that since appellee did not receive a deed to the premises until January 17, 1919, he was not entitled to maintain this suit on January 6, 1919, the date it was instituted, even though appellant's tendancy had terminated January 1, 1919. It must be remembered however that DeMange had leased the premises to appellee by agreement made December 23, 1918, the term to begin January 1, 1919. So that if appellant's lease terminated January 1, appellee was entitled to possession under his lease on the day the suit was commenced.

The most serious question in our opinion is whether the notice given appellant by DeMange had the effect of terminating appellant's lease January 1, 1919. By the terms of the lease, the lessor could terminate it by giving 60 days notice in writing prior to January 1 of any year, but it is insisted by appellant that having accepted payment of the rent in full to March 1, 1919, DeMange could not then by giving such notice terminate the lease on January 1, 1919 and that neither DeMange nor appellee his lessee was entitled to possession on that date. It seems to us that appellant's position is well taken. If appellee, or his lessor, could accept rent to March 1, 1919 and then terminate the lease on January 1, 1919, he could have accepted rent to March 1, 1919, and terminated the lease on September 1, 1918, if the lease has fixed that date instead of January 1. In such case the lease would terminate before the maturity of either the apple crop or corn crop, and appellant would be paying rent for six months after he was out of possession. There is no more legal authority for or justice in appellee's contention than in the case we have just supposed. It is a well established maxim that one party to a contract cannot accept the benefits of such contract and then repudate it. The right to declare a contract at an end by one party thereto, without the consent of the other party should be strictly construed. (People v. Economy Powder Co. 241 Ill. 290.) This is not a case of terminating the lease because of any fault of appellant, but simply the exercise of the arbitrary right of termination reserved to the lessor in the lease. In fact appellant stated in his letter of October 25, 1918, inclosing the notice of the termination of the lease, "I am not sending this notice because I have any other tenant in view or because of any complaint against you." His right to terminate the lease under such circumstances should certainly be strictly construed. It seems to us it would be unconscionable to allow him to terminate the lease on January 1, 1919 after having ac-

cepted and retained rent to the first of the following March, simply because he had an opportunity to dispose of his farm enhanced in value by the wheat crop which appellant had sowed thereon. The right reserved to terminate the lease on the 1st of any January by giving sixty days notice is so inconsistent with that part of the lease fixing the term of the tenancy at five years, that there should be some distinct consideration to support it. It cannot be said that any consideration therefor moved to appellant by that part of the lease providing that in the event the lease should be terminated on the 1st of any January "if the lessee has expended money in the care of the orchard on said premises, in preparation for future crops, in excess of the value of the crops raised on said premises by the lessee, for the season preceding any such January 1, then the lesse shall be paid the difference between the said sum of money so expended and the value of the crops raised for said season". In that event appellant could only recover the excess, if any, of what he had expended on the orchard in preparation for the future crops, over the value of crops raised on all the premises the preceding year. That would leave him receiving no income whatever for the preceding year and no opportunity to realize anything from the future crop of the orchard, for which he would have prepared the same. Appellant could not hope to derive any advantage from that provision of the contract under any circumstances. To adopt such a construction of the lease would result in rank injustice to appellant, who the evidence shows was willing to vacate the premises provided appellee would allow him the wheat crop he had sown, and which appelle admits he knew had been sown.

Under the facts in proof we are constrained to hold that DeMange having accepted rent to March 1, 1919, was estopped to terminate the lease January 1, 1919 and that appellee being his lessee, was therefore not entitled to maintain this suit on January 6, 1919, and it was error for the court to give the peremptory instruction.

The judgment is reversed and the cause remanded.

Reversed and remanded.

I do not concur in the foregoing opinion and judgment.

FRANKLIN H. BOGGS,
Justice.

Not to be reported.

Term No. 27 October Term 1919. Agenda No. 15.

WILLIAM M. CRAIG,
Administrator of the Estate
of M. M. Craig, Deceased,
Appellant
v.
W. H. LEACH, et al,
Appellees.

Appeal from FAYETTE.

216 I.A. 655

Opinion by Higbee, J.

Appellant as administrator of the estate of M. M. Craig, deceased, filed a bill in the circuit court of Fayette county for the foreclosure of a real estate mortgage given by appellees to said deceased to secure the payment to him of a promissory note for eight hundred dollars. Appellees filed an answer setting up the payment of the debt in the lifetime of the deceased. The trial court found that the debt had been so paid and entered a decree dismissing the bill and directing that the record of said mortgage be released and satisfied.

It appears that M. M. Craig, the deceased, was killed in an automobile accident June 17, 1918. Appellee, W. H. Leach had assisted the deceased in certain real estate deals resulting in considerable profit to the deceased. The note and mortgage were produced by appellant and introduced in evidence. It is true as contended by counsel for appellant, that the possession of a written instrument providing for the payment of money is prima facie evidence that the debt contracted therein is unpaid, and that upon the production in evidence of such an instrument the burden of proof shifts and rests upon the person claiming payment on satisfaction. In this case, however, prima facie evidence is clearly overcome by two wholly dis-interested witnesses who testified to statements made by the deceased in his lifetime to the effect that appellee W. H. Leach, had paid or satisfied the debt, and that deceased was going to release the mortgage and turn it and the note over to Leach. One of the conversations occurred about a month before his death and was between deceased and appellee W. H. Leach. There is also other evidence tending to show appellee Leach had been the cause of deceased making a profit of $7000 or more in certain real estate deals and that while deceased and Leach were talking of this transaction, Leach asked how they stood on that mortgage and deceased replied, "You don't owe me a cent, that is all paid and if anything I owe you." This proof well overcome the prima facie case made by the introduction of the note and mortgage and fully sustained the finding that the debt secured by the note and mortgage had been satisfied.

It is insisted that it was error for the trial court to permit appellee W. H. Leach to testify in his own behalf. A careful examination of the record discloses that he was not permitted to testify to any material fact occuring before the death of deceased and his testimony was competent as to facts occuring after the death. It is also urged that the court erred in not permitting appellant to prove certain statements and conversations made by deceased in his lifetime to the effect that the debt had not been paid. Such statements and conversations were self serving declarations and were clearly incompetent. Boyd v. Helm, 124 Ill. 370.

The decree is clearly sustained by the proof, no error appears on the record and it is accordingly affirmed.

Affirmed.

Not to be reported.

Term No. 34. Agenda No. 50.

October Term, 1919.

216 I.A. 655

HUGO CHAMBLISS, Appellee v. MARQUETTE LIFE INSURANCE COMPANY, Appellant.	Appeal from PULASKI.

Opinion by Higbee, J.

This is an action brought on a policy of life insurance issued by appellant on the life of one John Marshall, and made payable to appellee as "Hugo Chambliss, creditor." Appellant filed the general issue and twelve special pleas setting up in substance, that appellee had no insurable interest in the life of the insured, that the policy sued on was a wager policy and therefore void, and that the insured falsely answered certain questions in his application which were material to the risk, which also rendered the policy void. There was a verdict for appellee in the sum of $1000, the amount of the policy, and judgment followed for that amount.

It is not claimed by counsel for appellant that any error was committed in the admission or exclusion of evidence or in giving or refusing instrustions. It is a contention of theirs as set up in the pleas, that the policy is a wager policy and void, because appellee had no insurable interest in the life of the insured. It appears from the evidence that the insured, Marshall, applied for the policy through one J. R. Harmes an agent for appellant, and that all the premiums were paid by the insured, save the last one which was paid by appellee during the insured's last illness. Harmes testified appellee was not present when the application was made, but that Marshall then told him he was indebted to appellee in about the sum of $1000 and that at Marshall's request, he, Harmes, drew up a note payable to appellee, for that amount, which Marshall then signed. Appellee testified he did not know when the note was made, but that Marshall brought both the note and policy to him. It is claimed the evidence shows that the insured was not indebted to appellee in the sum of $1000 at that time. Even if true, that would not make the policy a wager contract as we understand that term. Bloomington Mutual Benefit Association v. Blue, 120 Ill. 121 was an action begun by Blue to recover on a policy issued by the association to one Bailey, naming Blue as the beneficiary. It was contended that Blue had no insurable interest in the life of Bailey, and hence the contract was void. In passing on that question the supreme court said "It may be regarded as a plain proposition of law, that a wagering policy, is void, and we think it also well settled that a policy taken out on the life of a third party by a beneficiary, in the continuance of whose life the beneficiary has no pecuniary interest, may be regarded as a wagering policy, and as such would be void. Had this policy been taken out by Blue on the life of Bailey, without his knowledge or consent, and had the premiums been paid by him, it would manifestly fall within what is known as a wagering policy, and would be void. Public policy forbids one person,

who has no interest in the continuance of the life of another, from speculating on that life by procuring a policy of insurance; but here it does not appear that Blue had any instrumentality whatever in procuring the policy on the life of Bailey, or that he paid any portion of the premiums to procure the policy or to keep it in force." In the case at bar it does not appear that appellee had anything to do with procuring the policy, but on the contrary the evidence shows the insured himself procured it without the knowledge of appellee, and paid all the premiums save the last one. Under this state of proof the policy in question does not fall within the above definition of a wagering contract.

In Wohlberg v. Merchants Reserve Life Ins. Co., 209 Ill. App. 176 the court held that whether plaintiff was a creditor of the insured, in life policies made payable to plaintiff as a creditor, was irrelevant in a suit on such policies, where the insured took out the policies and paid the premiums thereon, as under such circumstances he could make them payable to a stranger. Such are the facts in proof in this case, and it would seem under this authority that whether appellee was in fact a creditor of the insured, was immaterial. If the evidence had shown that appellee had procured the insured to apply for the policy, and had himself paid the premiums, a different rule would no doubt apply.

The questions to which it is claimed the insured made false answers are as to his occupation and his habits in the use of intoxicating liquors. These questions plainly concerned matters material to the risk, and the answers if false, would vitiate the policy. The question whether the answers were false was a question to be determined by the jury, and the burden was upon appellant under the pleas, to prove their falsity. (Vail v. North American Union, 191 Ill. App. 297; Poland v. Supreme Tribe of Ben Hur, 2 Ill. App. 176) The insured gave his occupation as that of teamster. It is not claimed his occupation was a more hazardous one, but that he had no occupation. The answers to the following questions are also claimed to be false: "Have you ever used malt or spirituous liquors to excess"? (If yes, give full information) "No". "State average quantity you use each day of malt liquors?" "None," "Wines?" "None". "Spirits". "None." Upon the question as to whether these answers were false, appellant placed eleven witnesses on stand, and appellee seventeen. The evidence of these witness varied to quite an extent, but without discussing the same in detail, it is sufficient to say, the evidence warranted the finding of the jury in favor of appellee on that question. No sufficient reason appears from the record for disturbing the judgment in this case and it is accordingly affirmed.

Affirmed.

Not to be reported.

Term No. 38. Agenda No. 21.

October Term, 1919.

WILLIAM JOHNSON,
Appellee
v.
OSCAR W. WEEKE,
Appellant.

Appeal from ST. CLAIR.

216 I.A. 656

Opinion by Higbee, J.

Appellee William Johnson brought suit in case against appellant Oscar W. Weeke to the April term, 1919 of the circuit court of St. Clair county, filing a declaration of two counts. The first alleged that on January 15, 1919 appellant was driving a certain automobile, to which was attached by a rope or cable, another automobile over and across a sidewalk on the westerly side of Collinsville avenue, in the city of East St. Louis, which avenue and the sidewalk thereon were public thoroughfares while appellee, in the exercise of due care and caution for his own safety was walking along said sidewalk; that appellant so carelessly and improperly operated, drove and managed said automobiles over and across said public sidewalk and thoroughfares that by and through his negligence and improper conduct, the said automobile, which was being drawn by a rope or cable, as aforesaid ran into and struck appellee, knocking him to the ground and greatly injuring him. The second count was based upon section 4 of the Motor Vehicle law and alleged that appellant was towing an automobile over and upon a public highway in the city of East St. Louis, after the hour of sunset, without having two lighted lamps, showing white lights visible at least 200 feet in the direction towards which said automobile was proceeding, and by reason thereof, ran upon appellee and injured him. There was a plea of not guilty and a verdict and judgment against appellant for $1500.

There is substantially no controversy over the facts which appellee concedes to be correctly stated by appellant in his brief, substantially as follows: The Stagen and Weeks Cigar Company, of which firm appellant was a member, occupied a brick building in the city of East St. Louis with a drive way 12 to 14 feet wide, through the center. It also owned a Ford truck which was out of order, could not be operated under its own power and had been placed in the building. About 6:30 P. M. on the day above mentioned, the truck was attached by a rope about 12 feet long to an automobile, driven by appellant, in order that it might be towed to a garage for repairs. Richard Junck, a chauffer, employed by the Cigar Company, was in the truck to steer it. As they came out of the driveway onto the sidewalk both appellant and Junck swore there were several persons on each side of the driveway waiting for them to pass out but appellee testified that he did not notice any one else there. After the automobile had passed out of the driveway over the sidewalk and the front end of the truck was a little past the middle of the sidewalk, appellee walked in front of the truck, tripped over the rope connecting the two machines, fell against the fender and was run over by the front wheel of the truck. Junck called to appellant when he got in front of the truck and used the emergency brake, but did not attract

appellee's attention or succeed in preventing the injury. Appellee who was seventy years of age, was, after his injury placed in an ambulance and taken to his boarding house and from thence to a hospital.

It is contended by appellant that the evidence does not show any actionable negligence on his part and that the court erred in giving two of appellee's instructions. An examination of the record discloses that appellant was guilty of negligence in proceeding as he did out of the dark passage way across the sidewalk of a public street, towing an unlighted car by a rope or cable, 12 feet long after dark, and the jury, under the circumstances, were also warranted in absolving appellee from the charge of contributory negligence. It is easy to conceive how one passing along the sidewalk and seeing a lighted automobile emerging from the dark passageway, might readily take it for granted that it would be safe for him to pass behind the car, not warned of the fact that another car was following in tow. The question raised, however, upon the third instruction, given for appellee, is not so readily disposed of. In that instruction the court instructed the jury as follows: "If you believe from the greater weight of the evidence that the plaintiff has proved his case as laid in his declaration by a preponderance of the evidence, then this is sufficient to entitle the plaintiff to recover and you may find a verdict in his favor." It is contended by appellant that said instruction would permit the jury to find a verdict in favor of appellee upon either count of the declaration, whereas there could be in fact no recovery under any view of the evidence upon the second count of the declaration. This contention is based upon the claim that as the automobile which proceeded the truck, had the lights required by the statute, it was not necessary that the truck which was being towed by it should have two bright and conspicuous lights. That the statute does not apply to a motor vehicle being towed by another, but that all which is required under the circumstances of this case is that the front motor vehicle have the proper lights; that from the very nature of the circumstances, where one vehicle is being towed behind another, the situation is such that however bright the lights might be on the rear vehicle, they would not be visible at a distance of 200 feet in the direction towards which it is proceeding; that if the truck when upon the public sidewalk was upon a public highway, then so far as appellee was concerned, the question of the lights upon the truck would be wholly immaterial because he was not approaching it from the front nor from the rear and the truck was bound to be in his plain sight whether it had lights or did not. If it was just coming upon the sidewalk from within the building and was not yet upon the public highway, the statute did not apply because, under the statute, it was not required to have the bright and conspicuous lights at any time other than "when upon any public highway."

The second count in itself stated a good cause of action and there was evidence bearing upon the question raised by it, consequently the instruction was properly given as it was for the jury to determine, from all the evidence in the case, viewed in the light of the instructions given by the court, appellee was entitled to a recovery thereunder. We are inclined to the view that the truck in question was at the time of the

injury to appellee, in effect, upon a public highway of this state and the fact that it was being towed by another motor vehicle, that it was going across the highway instead of up or down it, did not release it from the duty of carrying the lights provided by statute. The very fact that the front vehicle carried lights, might under the circumstances, made it the more necessary that the one following should also carry them. One walking along the sidewalk at right angles to the direction of the two vehicles, seeing the one with the lights passing in front of him, might reasonably expect it to be safe to pass behind it and by reason of the absence of lights on the second vehicle he might not see the danger he was incurring by proceeding on his way.

Upon the whole case we are of opinion that the facts warranted the verdict and that there was no error in giving the instruction above referred to or instruction No. 2 which also contained in effect the same statement of law as above complained of by appellant and that substantial justice has been done. It may also be said that one of the two counts in the declaration is not complained of by appellant and that the verdict of the jury was a general one, consequently appellant is not in position to challenge the verdict by raising the question presented by him.

Judgment affirmed.

Not to be reported in full.

Term No. 44. Agenda No. 18.

October Term, 1919.

E. A. KELLER CO.,
Appellee
v.
ARTHUR U. BARCO,
Appellant

Appeal from MADISON.

216 I.A. 656

Opinion by Higbee, J.

This is an appeal from a judgment of the circuit court of Madison county for the sum of $344.65 recovered by appellee in an action based on fraud and deceit. The original declaration, filed to the May term, 1917, contained only the common counts. Appellant and counsel for appellee were absent for a time in the military service of the United States and the cause stood continued. On January 23, 1919, two additional counts were filed alleging fraud and deceit. At the close of the evidence the common counts were dismissed. The cause was tried before a jury.

The case arises out of the sale of an automobile by appellee to appellant. On May 8, 1916 appellee sold an automobile to appellant for $600 and in payment therefor, appellant assigned to appellee "without recourse" a promissory note for $600 executed by Frank P. and Anna Maniaci, payable to appellant's order and secured by a chattel mortgage. Before the note became due the mortgagors left Edwardsville and appellee upon proceeding to foreclose its mortgage discovered there were several prior mortgages upon a considerable portion of the chattels covered by its mortgage. Only the sum of $255.35 was realized from the sale of such property as was not included in other prior mortgages. The verdict was for the balance of the $600.

It was alleged in the declaration and contended by appellee that at the time of the transaction, appellant represented the mortgage as being a first lien on the property covered thereby and that the note was "guilt edge." This was testified to by the president of appellee, who negotiated the deal, and was flatly denied by appellant, they being the only witnesses testifying on this question. Appellant testified he knew of the prior mortgages at the time of the transaction and that he informed appellee there were prior mortgages on a portion of the chattels, and denied that he stated the note was "guilt edge." Almost the whole of the argument of attorneys for appellant is devoted to the proposition that the verdict is not supported by the evidence. Since appellant admitted he knew of the existence of the prior mortgages at the time of the sale, and claimed he informed appellee of the same, the only question really remaining before this court is the one of fact, whether appellant did represent the mortgage in question to be a first lien on the property. As above stated there were only two witnesses on this question and they are directly contradictory. The credibility of these witnesses was submitted to the jury. "It was therefore for the jury to determine from the appearance of the two witnesses upon the stand, their manner of testifying, etc., which one of the two they would believe. This they had done by their verdict, and where there is as clear and glaring a conflict in the evidence upon the main question in the case,

as is presented by this record, it is no part of the duty of an appellate court to disturb the finding of the circuit court." Stampofski v. Steffens, 79 Ill. 303. Appellee was engaged in the general hardware business including the sale of automobiles. Appellee's president, who negotiated the deal, testified he relied and acted upon appellant's representation that the mortgage was a first lien. If appellant did make such false representation to induce action of appellee, and appellee did rely and act upon it, to its injury, the fact that an examination of the records would have disclosed the falsity of the representation does not relieve appellant from liability. Kehl v. Abram, 210 Ill. 218.

It is also claimed by appellant that the trial court erred in not permitting him to show that E. A. Keller, who was appellee's president at the time of the transaction, was also a director of one of the banks in Edwardsville. This evidence was of no material importance and there was no error in the ruling. A suggestion is made by appellant in his brief but not argued, that two instructions offered by him and refused by the court should have been given. One of these advanced the theory that it is the duty of a party to use due diligence to protect himself from fraud and the other the theory that every one in a trade has the right to exalt the value of his own property to the highest point the others credulity will bear. Even if these instructions had stated correct principles of law, they had no application to the case on trial and were properly refused.

There being no good reason apparent why this court should interefere with the verdict of the jury, the judgment will be affirmed.

Affirmed.

Not to be reported.

Certiorari denied

Term No. 45. Agenda No. 27.

October Term, 1919.

C. HENRY FOREMAN,
Appellee
v.
HERRIN & SOUTHERN RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellants.

Appeal from MASSAC.

MAR 25 1920

216 I.A. 656

Opinion by Higbee, J.

This is an action of trespass on the case brought by appellee in the circuit court of Massac county to the January term, 1919 against appellants and one A. B. Smith. Smith was not served with process and after the evidence in the case was heard the suit was dismissed as to him.

The declaration consisted of two counts. The first count charged that on the seventh of November, 1916, plaintiff owned and was in possession of a certain farm with barn and other buildings thereon and certain personal property located in said barn; that defendants were possessed of and using and operating a railroad extending from Metropolis to Herrin, Illinois, passing over and across plaintiff's said farm, and that they were possessed of the land to the said railroad appertaining, being a strip of land 450 feet wide across plaintiff's farm, and that there was located thereon the main line, side line and five switch tracks all extending through said farm; that it was the duty of defendants to keep the said strip of land clear of all dead grass, dry weeds and other dangerous combustible materials, so that fire from the derrick locomotive engines of the defendants on said railroad would not by means of such dead grass, etc. on the right of way, be communicated therefrom to the farm property of plaintiff, yet the defendants not regarding their duty in that behalf, did not, nor would keep the said strip of land and right of way free from dead grass, dry weeds and other dangerous combustible materials, but on the contrary before that time suffered great quantities of such dead grass, dry weeds and other dangerous combustible materials, shavings, bark, wood, wood offall, poles and timbers to accumulate and negligently suffered and permitted the same to remain on said strip of land and right of way, by means whereof fire then and there emptied and thrown from a certain derrick locomotive engine of the defendants on said railroad, then and there ignited the said dead grass, etc. on said right of way and spread and was communicated by the same and by the wind to and upon the said farm and property of plaintiff, whereby said property was totally consumed by the fire. The second count contained substantially the same allegations as to the ownership and operation of the property, and the accumulation of the combustible material thereon, but made no mention of the derrick locomotive, but instead charged that defendants owned and operated a large open fire pit just north of switch track No. 4, in which they kept and maintained a hugh fire for the purpose of heating creosote and other preservatives by means of coils of pipe in the bottom

thereof, connected with a perpendicular tank in which timbers were dipped in creosite; that defendants suffered great quantities and piles of dead grass, dry weeds and other dangerous materials, shavings, bark, wood, wood offall, stocks, poles and timbers to accumulate on said right of way in close proximity to said open fire pit and to plaintiff's farm buildings, and that by means thereof the fire kept and maintained in said open pit scattered to and was blown by the wind to the said dry grass and dangerous combustible materials, and ignited the same, and thereby then and there caused a great fire in said poles and timbers on said right of way, and the said fire was thereby and by the wind, spread and communicated to the farm property of plaintiff whereby it was wholly destroyed. To this declaration both appellants filed only the general issue. The jury rendered a verdict for appellee in the sum of $3000 and for this amount judgment was given.

It appears that by a lease dated January 1, 1914 the Chicago Burlington and Quincy Railroad Company, had leased to the Paducah Pole and Timber Company, a firm composed of said A. B. Smith and one W. G. Smith the right of way on which is located the five tracks, referred to as switch tracks, to be used as a pole and timber yard. The fire pit before mentioned was located almost directly south of appellee's barn and about 400 or 500 feet therefrom. The Paducah Pole and Timber Company would have its poles and timbers brought to the premises usually by the Chicago, Burlington and Quincy Railroad, and after smoothing down the knots and otherwise dressing them would dip them in a tank containing creosote which had been heated in coils of pipe running through the fire pit. After being so treated the poles were piled in different places between the tracks of the right of way until hauled away, usually by the same railroad. A derrick locomotive was used in handling the poles while being so treated. The evidence showed that the shavings, etc. resulting from dressing the poles, were allowed to accumulate wherever they happened to fall, and also that a considerable portion of the right of way was covered with dry grass and dead weeds. On the eighth day of November, 1916, when a high wind was blowing from the south, a fire started near the fire pit in some grass, shavings or other rubbish close to a pile of poles which had been treated and upon reaching the poles, blazed up and burned very fiercely. It then traveled through the grass, shavings, etc. to the pile of poles next on the north and so on, until it had crossed to the second of the switch tracks from the north. At about this stage it was noticed that appellee's barn located north of the main line was on fire. The fire appears to have started some little distance from the derrick locomotive, although this locomotive was being used in and about the "switch" tracks on that day.

Appellants insist that the proofs do not sustain the cause of action set out in the declaration, it being their contention that the evidence shows the fire originated from the fire pit and not from the derrick locomotive as charged in the first count, and therefore there can be no recovery under that count. The evidence does in fact show the fire started much nearer the fire pit than the derrick locomotive, and there may be some question as to whether appellee is entitled to recover under the first count. As to count two appellants contend the

proof shows that neither of appellants were, at the time, in possession of the right of way, as it had been leased to the Paducah Pole and Timber Company or A. B. Smith and his brother and that the fire pit mentioned in this count, was owned and operated by the Paducah Pole and Timber Company or A. B. Smith and brother and not by either of the appellants and for that reason appellee has not established his cause of action as set out in that count. As we view this case, appellants are in no position, under the pleadings to raise that question at this time. Appellants each filed only the general issue. The rule is well established in this state that in cases of this nature, the occupation, ownership or operation of the property or instrumentalities which are set out as connected with, or as the cause of the injury, are not denied by the general issue, as they are matters of inducement which need not be proven unless put in issue by a special plea. The line of decisions applying this doctrine commences with McNulta v. Lockridge, 137 Ill. 370 and are fully discussed in Carlson v. Johnson, 263 Ill. 556. To the same effect is the case of Wheeler v. C. & I. R. R. Co., 267 Ill. 306. Under that doctrine we must hold the plea of general issue admitted that appellants were in possession of the premises when the fire originated and of the instrumentalities which are alleged to have caused the fire. Furthermore appellant, Chicago, Burlington & Quincy Railroad Company, in its lease of the premises to the Paducah Pole & Timber Company, which was introduced in evidence, expressly reserved "all railroad tracks with the necessary and convenient right of way therefor now on said premises with the right to operate the same and the further right to construct and operate other tracks over said premises where the same shall not interfere with the structures of the lessee." It is insisted further by appellants that there is a fatal variance between the allegations of the declaration and the proof in respect to the cause of the fire. It is the contention that the declaration alleges the fire was spread and communicated to appellee's barn by means of the dry grass, weeds, etc. and by the wind whereas the proof shows the fire was communicated to the barn by an usually high wind blowing brands of fire or "faggots" on the barn from the burning piles of poles. Appellants were under a statutory duty to "keep their right of way clear from all dead grass, dry weeds or other dangerous combustible material" (Hurd's Rev. Stat. chap. 114, sec. 63) and they could not relieve themselves of this duty by leaving the premises. The evidence clearly shows that dead grass, dry weeds, shavings, etc. had accumulated and that the poles after being dipped in the creosote were very inflamable. The evidence also shows the fire started in some grass or shavings near a pile of poles and the poles caught and burned very fiercely; that the fire traveled through the grass, shavings, etc. from one pile of poles to another, and in the direction of appellee's barn. It appears to us that even though the grass, weeds, poles, etc. did not burn actually up to the barn, and even though the barn caught from a brand of fire blown by the wind, yet these proofs fully sustained the allegations that appellants violated their statutory duty to keep their right of way clear of such material, and that such material and the wind did communicate the fire to the barn. As a consequence

we conclude there was no material varience between the allegations and the proofs.

It was not error for the court to refuse the seven special interrogatories asked by appellants. Six of these asked of the jury, who maintained the open fire pit, who was in possession of and operating the derrick locomotive engine, what was said engine used for, what was the fire pit used for, were any poles piled near said engine or fire pit and if so who was the owner of the same. The seventh asked the jury to state whether the evidence proved that a spark or faggot of fire was blown by the wind from a fire originating in a pile of poles or piling upon the barn of appellee, setting it on fire. Answers to all of these interrogatories in a manner favorable to appellants would not have been fatal to or inconsistent with a verdict for appellee under the law as we have held it to be applicable to this case. They did not relate to ultimate or controlling facts which would control the general verdict, but to facts which as we have seen were matters of inducement under the pleadings.

What has been said also disposes of appellants' objections to appellee's fifth instruction which, while not in all respects technically accurate, states the law substantially in accordance with the views we have expressed in regard to appellant's obligations arising from dangerous combustible materials allowed to accumulate on the right of way in question. The refusal of the court to give the 8th, 10th and 13th instruction of appellants as offered is also assigned and argued as error. The instructions as offered required the proof to show the ownership and operation by appellants of the premises and instrumentalities causing the fire. This, under the authorities cited was the requirement of proof of immaterial matters of inducement, and therefore it was not error to refuse said instructions.

The damages awarded do not appear to be excessive, the proofs amply sustain the verdict and the jury was fully instructed at considerable length as to all phases of the law governing the case.

The judgment will be affirmed.

Affirmed.

Not to be reported.

Term No. 58. Agenda No. 24.

October Term, 1919.

216 I.A. 656

BETTIE WOLF,
Appellee
v.
PETE RANKEL, et al,
Appellants.

Appeal from FRANKLIN.

MAR 2

Opinion by Higbee, J.

This was an action on the case under section 9 of the Dram Shop Act of appellee, Bettie Wolf, against appellants, Pete Rankel, Anton Statkewice, Albert Barney and Bert Nigro, for damages to her means of support on account of the habitual drunkeness of her husband, Monroe Wolf.

The declaration consisted of two counts, to which the plea of general issue was filed. A trial was had, and at the close of plaintiff's evidence, without any evidence for defendants having been offered the case was submitted to the jury without any instructions except as to the form of the verdict. The jury returned a verdict against all of the defendants for $600.00. This appeal was taken from the judgment entered on that verdict. The brief and argument of attorneys for appellants are devoted entirely to the contention that the evidence does not sustain the verdict. Attorneys say in their argument "We are willing to submit this case to this court on the sole proposition as to whether or not the evidence is sufficient to sustain the verdict." All other assignments of error are therefore waived.

The claim of appellants is that there was no evidence whatever to sustain a verdict against the defendant, Anton Statkewice, and that the judgment, being against all of the defendants must, if reversed as to one, be reversed as to all. This question is not raised in the motions for new trial and in arrest of judgment, nor in the assignments of error, save under the formal and general averments that the verdict is contrary to the law and evidence.

A careful examination of the abstracts shows that the proof clearly connects the defendant, Anton Statkewice, with the sale of intoxicating liquor to appellee's husband. Two witnesses, Emmerson Williams, and Ed. Gower testified that Anton Statkewice was engaged in the saloon business in West City, and the abstract shows the witness James Adams testified "Do not know the place of business of Anton Statekwice under that name. I know the saloon known as the Blue Front; H. A. Smith." Monroe Wolf, husuband of appellee, testified, "I know the H. A. Smith place. It is known as the Blue Front. I purchased intoxicating liquor in that place of business." Appellee testified, "I know where the Blue Front is. I have seen my husband buy intoxicating liquor in that place of business. He has drove me up there in the buggy at different times, got the booze and drank it at home." This evidence tends to show that Anton Statkewice was conducting a saloon in West City known as the "Blue Front or H. A. Smith Place," and clearly establishes that appellee's husband bought intoxicating liquor at that place. In addition to this appellee's husband testified that he had spent a couple of hundred dollars, anyhow "for booze," with these four defendants, and that he had spent part of a

certain $50 check "For booze with Albert Barney, Bert Nigro and these four defendants in this suit." He further testified he had bought whiskey "All over West City," "All over the town," "In every saloon in the place," "and every place," and "All saloons in West City except Tony Phrancabbage." This evidence was clearly sufficient to connect Anton Statkewice with the sale of intoxicating liquor to appellee's husband and to warrant a verdict and judgment against him.

It follows that the judgment in this case should be affirmed.

Affirmed.

Not to be reported.

Term No. 60. Agenda No. 48.

October Term, 1919.

HENRY C. BASS,
Appellee
v.
MALACHI W. MICHAELS,
Appellant

Appeal from MARION.

216 I.A. 656

Opinion by Higbee, J.

This is an action on the case brought by appellee against appellant for criminal conversation and alienation of his wife's affection. The declaration consists of four counts, the first, second and fourth counts charging criminal conversation and the third the alienation of the affections of appellee's wife. A plea of the general issue was filed and the cause was tried by a jury, resulting in a verdict for $3000. This appeal was perfected to reverse the judgment rendered on that verdict.

Appellant was a widower and had resided in Marion county for a number of years, where he owned two farms, one of 240 acres with improvements which he rented out to tenants, and one of 80 acres upon which he resided. The dwellings on the two farms were about 40 rods apart. He was a member of the Baptist church and frequently assisted in revival meetings. In 1915 he attended the National Association of General Baptists at Seebird, Kentucky, and on his return stopped off at Grayville, White county, Illinois, where appellee then resided, to attend another meeting. He there met appellee who was a member of the same religious denomination. They afterwards at various times met at other religious gatherings, and the acquaintance grew, until finally a proposal was made by one of them that appellee purchase appellant's 240 acre farm and in the fall of 1916 the terms were agreed upon and the deal consummated. Appellee failed to meet his obligations incurred in the purchase of the farm, and after considerable negotiations it was finally agreed, apparently in February, 1918, that appellee should pay appellant $1000 and give up the farm March 1, 1918. Appellee held a public sale of his property on March 1, 1918. Appellant in the meantime had sold his 80 acre farm and on February 28, 1918, with appellee's consent moved into one room of the house where appellee then lived. On the evening of the day of his sale, appellee took his children to a neighboring farm he had rented, but did not take his wife, whom he left at the house where they had been living and where appellant then was. The evidence shows she made an effort to get a liveryman to come after her that evening, but was unable to do so. She left early the next morning.

It is contended by appellee that while they were living on the farm purchased from appellant, his wife, against his protest made frequent trips to appellant's home where he lived alone. Appellant contends she came only when he was sick, and then brought one of her small children with her. He also contends appellee became angered at him over their financial deals and brought this suit in a spirit of revenge.

The grounds upon which a reversal of this judgment is sought are, that the court erred in its rulings on the admission and exclusion of evidence and in giving and refusing instructions and that the verdict is against the weight of the evidence.

A man by the name of Hoots formerly lived with his family on the farm purchased by appellee. Appellant contends the court erred in permitting appellee to show over his objection that a daughter of this man, Stella Hoots, resided with appellant during a portion of the summer of 1917. The trend of the proof was such that it would have been practically impossible to have tried the case without knowledge of this fact reaching the jury, yet there were times when the court admitted evidence referring to it, over appellant's objction, when the same should have been excluded. It seems to us however that the admission of this evidence was not of sufficient moment when all the proof is considered, to amount to reversible error. Attorneys for appellant in their brief have pointed out so many other instances in which they claim the court erred in ruling on the evidence admitted or rejected, that it would be impossible to discuss them within the proper limits of this opinion. We deem it sufficient to say that after a careful investigation we are of the opinion that while the rulings were not always strictly correct yet on the whole the proof fairly presented the case to the jury and that there was no error in the regard of the same which would warrant a reversal.

The court gave the following instruction in behalf of appellee: "You are instructed that it is almost universally true that the act of adultery can be proven only by circumstantial evidence. It is an act committed in secrecy and usually the parties use every means in their power to conceal their act and prevent discovery. The testimony in reference to adultery is generally circumstantial. The fact of adultery may be inferred from circumstances that naturally lead to it by a fair inference as a necessary conclusion. You are instructed that if you find from a preponderance of the evidence in this case a number of circumstances, either of which when considered alone would be insufficient to prove the charge of adultery, but when considered together are amply sufficient to establish the offense, then you are instructed that the fact of adultery is sufficiently proven." This language is taken almost verbatum from the opinion of the court in Zimmerman v. Zimmerman, 242 Ill. 559, but appellant while not questioning the soundness of the doctrine stated, insists that the instruction is argumentative and therefore should not have been given. But it stated the law correctly, and while such instructions are not favored by the courts and should be avoided, yet the giving of the same does not constitute reversible error unless it appears that the opposite party has been unfairly injured thereby. We cannot say that in this case appellant was so injured by said instruction. It is also insisted the following instruction given for appellee was erroneous: "The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff, Henry C. Bass and Hattie Bass, were lawfully married and were living together as husband and wife, pursuant to such marriage as alleged in plaintiff's declaration, and that the defendant, Malachi W. Michaels, induced the wife of the plaintiff to frequently visit him, the defendant at the house where the defendant was then and there living alone, and had sexual intercourse with the wife of the plaintiff, without the consent of the plaintiff, by reason whereof the plaintiff was deprived of the society of his wife

and her services and lost her affection and suffered degradation, mental anguish and disgrace, as alleged in plaintiff's declaration or some count thereof, you should find the defendant guilty." It is insisted this instruction invades the province of the jury, because it does not require the jury to find from the evidence that appellee was deprived of the society and services of his wife, by reason of appellant's acts, but assumes that if the facts mentioned in the first part of the instruction are true it necessarily follows appellee was deprived of his wife's society and affections. We do not think this instruction is subject to the construction placed upon it by counsel for appellant. While not carefully drawn in all respects it seems to require proof of the loss by appellee of his wife's society, services and affection in the same manner as the other facts stated as necessary to be proven to warrant a finding of the guilt of appellant.

Appellee's fourth instruction is as follows: "You are instructed that as to the third count in plaintiff's declaration it is not necessary before you find the defendant guilty that you find that the defendant and the wife of plaintiff were guilty of adultery but it is sufficient if you find from the preponderance of the evidence that the defendant did entice and procure the wife of the plaintiff without his consent to leave and depart from the home of the plaintiff as alleged in the third count of the declaration." This instruction was based on the third count of the declaration, the gist of which was alienation of affections and it is claimed that the instruction is erroneous because it ignores the question of alienation of affections and requires the jury to believe only that appellant induced and procured the wife to leave appellee's home. In a literal sense the criticism of this instruction may be true but when considered in connection with the count of the declaration to which it refers, it could not be misleading. It is also urged that the court erred in refusing to give certain instructions referred to as appellant's first, second, third and fourth refused instructions. The first and third of these instructions advised the jury that if appellee's conduct towards his wife resulted in the loss of her affections, appellant should be found not guilty. The second informed the jury that unless they believed from the preponderance of the evidence that appellant had committed adultery with appellee's wife, or that he willfully and maliciously destroyed and alienated her affections, they should find him not guilty. The fourth informed the jury that if they believed from the evidence appellee's wife was not induced to separate from appellee by any wrongful act of appellant, but that appellee deserted her without just cause, they should find appellant not guilty.

These instructions stated correct propositions of law and might well have been given, but they really amounted only to stating in the negative what was in other instructions affirmatively stated, viz.: that before the jury could find appellant guilty they must believe from a preponderance of the evidence that appellant had wrongfully alienated the affections of appellee's wife or had committed adultery with her, and being covered by other instructions it was not error to refuse them. There is ample evidence in the record to sustain the finding by the jury that appellant was guilty of the charges made

against him in the declaration, which it would serve no good purpose for us to discuss here. As the proof fully sustains the verdict and the record shows no reversible error the judgment in this case will be affirmed.

Affirmed.

Not to be reported.

Term No. 30 Agenda No. 17

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term, 1919.

216 I.A. 657

JOE CATELLO, Appellee vs. Chicago, Burlington, & Quincy Railroad Company, Appellant.	Appeal from the Circuit Court Franklin County

Opinion by Boggs, P. J.

An action on the case was instituted against appellant in the Circuit Court of Franklin County for damages alleged to have been caused by the erection of a coal chute near the premises of appellee whereby dust and dirt were thrown on appellee's premises and on account thereof and on account of the noise incident to the operation of said coal chute the value of appellee's premises became greatly depreciated. One trial was had resulting in a verdict in favor of appellee for $600. Said verdict was set aside and the declaration was amended. A new trial was had resulting in a verdict and judgment in favor of appellee for $500.. To reverse said judgment this appeal is prosecuted.

The amended declaration consists of two counts. The first count charges among other things that "the aforesaid 'coal chute' was constructed by defendant in a thickly populated part of the said city of Christopher, and that in the operation of said 'coal chute' coal was loaded into said chute from railroad cars by means of a steam shovel and from said coal chute coal was loaded into locomotive engines. That in the operation of said coal chute intolerable noises were and are produced and great quantities of coal, dirt, dust, cinders, ashes and noisome vapors were and are carried and cast in and upon said premises of defendant," alleging permanent injury, etc. The second count is similar to the first except it omits the allegation that said coal chute was constructed by appellant in a thickly populated part of the city of Christopher. To said declaration a plea of the general issue was filed.

The record discloses that appellee became the owner in fee of lots 24 and 25 in B. Horn, Dimond & Mitchell's Third Addition to Christopher, Illinois, in May, 1908; that lot 25 is contiguous to the right of way of appellant, Railroad, being east of said right-of-way and lot 24 is immediately east of lot 25. After acquiring said lots, appellee improved the same by building thereon a dwelling of five rooms, a wash house and other buildings. He fenced said premises, planted certain fruit trees thereon, and since August, 1908, has resided thereon with his family. In 1916 appellant erected on its right-of-way about 100 feet west of appellee's premises the coal chute in question having a capacity of about 135 tons. The coal is hoisted into the chute from railroad cars by means of a steam shovel, commonly called a "Clam shell" and by force of gravation is run from said chute into the engine tenders through a passageway or apron. Said chute is operated at all times by day and

night. The evidence disclosed that when the wind is blowing from a westerly direction coal dust settles on appellee's premises and that the smoke and gas coming therefrom is very offensive to the occupants of said premises. The record also discloses that said premises were a part of certain premises once owned by one Clem Pundsack who became the owner thereof in 1902 by warranty deed from Frank L. Dennis and wife.

On July 13, 1904 articles of incorporation under the laws of the State of Illinois were issued to the Northern & Southern Illinois Railway Company, the predecessor and grantor to appellant railroad. The record further discloses that on July 11, 1905 Pundsack and wife by warranty deed conveyed a hundred foot strip for right-of-way where the road was then located across and thru the Northeast quarter of the Northwest Quarter of Section 25, Township 6 South, Range 1 East of the 3rd P. M. being fifty feet on each side of the center line of the main track of the Northern & Southern Illinois Railroad track as same is now staked and marked off across upon and beyond said Northeast Quarter of the Northwest quarter. The premises owned by appellee were located in said forty acre track formerly owned by Pundsack and appellee claims title to said lots thru mesne conveyances from Pundsack.

Appellate assigned as error the ruling of the court on the evidence, and the instructions and the ruling of the court in denying the motion made by appellant at the close of appellee's evidence and again at the close of all the evidence to direct a verdict in favor of appellant. It is the contention of appellant that the court erred in refusing to direct a verdict in its favor for the reason that no charge of negligent construction or operation of said coal chute is made in the declaration and no proof thereof is shown by the evidence and that without such proof no right of recovery is shown. While on the other hand appellee's contention is that inasmuch as said coal chute was constructed after appellee had purchased said premises and erected his dwelling house thereon that he would be allowed to recover upon proof being made that the operation of said coal chute carried dust and dirt to his premises and that the value thereof was depreciated thereby and this without showing any negligence on the part of appellant in the operation of said machinery.

Since the adoption of the Constitution of 1870 where premises are condemned for railroad purposes under the Emminent Domain Act the owner of said premises is entitled to recover not only the value of premises taken but also for damages to the value of premises not taken. It has further been the law since adoption of the Constitution of 1870 that where premises were condemned under the Emminent Domain Act for right-of-way for railroad purposes, damages to the lands not taken must be recovered by the then owner of the premises in the same proceeding. In other words, if the then owner of the premises does not recover the damages at the time said railroad right-of-way is condemned the right of action therefor does not pass to a subsequent purchaser. C. & E. I. R. R. Co. vs. Loeb, 118 Ill. 203. I. C. R. R. vs. Anderson 73 App. 621.

The law further is that where the owner of premises deeds to a railroad company a certain part thereof for railroad

right-of-way, he thereby bars himself from recovering damages incident to the operation of said railroad for railroad purposes, provided the railroad company is not negligent in the operation of the same. C. & E. I. R. R. Co. vs. Loeb, supra. I. C. R. R. vs. Anderson supra.

Appellee, however, contends that the doctrine set forth in these cases just cited does not apply to the facts in the case for the reason that at the time said right-of-way was conveyed by Pundsack and at the time appellee erected his residence on the premises owned by him it was not to be contemplated that appellant would use said premises so conveyed to it for the purpose of the construction and operation of a coal chute, and that therefore, he should not be barred of a right of recovery.

Appellee cites in support of his contention certain cases from other jurisdiction and also the case of Wylie vs. Elwood, 134 Ill. 281.

In the case just mentioned suit was brought for damages to the premises of Elwood alleged to have been occasioned by the construction of a coal shed for the loading, unloading and storing of coal by the use of machinery, etc. The premises in question owned by Elwood were part of certain premises formerly owned by on Joel A. Matheson who had conveyed to the Joilet & Northern Indiana Railway Company the south part of the south half of the block lying between Michigan Street and Eastern Avenue fronting south on Washington Street and having a width or depth of 130 feet. It was claimed this strip 130 feet wide was leased by the J. & N. I. R. R. Co. to the Michigan Central Railroad Company tho no such lease was produced in evidence. On May 2, 1887, the Michigan Central R. R. Co. leased the strip to the appellant, J. W. Sylie of Davenport, Iowa, for three years at a nominal rental of $1. per year for the storage and sale of coal, the lessor reserving the right to terminate the lease if the business should not be conducted to the satisfaction of the company, or the latter should desire the property for its own use. It will be observed in the deed to the strip of 130 feet nothing was said about it being for railroad right-of-way or for railroad purposes. Said deed was also executed prior to the adoption of the Constitution of 1870 so that there was no right of recovery by the owner of the premises in which railroad right-of-way was condemned to recover for damages to lands not taken. It was held in this case that there could be a recovery by reason of the fact that no right of recovery for damages to lands not taken was in the owner of the premises at the time the strip of 130 feet was conveyed upon which the coal shed was afterwards erected, and for the further reason it was averred in the declaration and proven on the trial that the coal shed was erected in the heart of the city in a populous district.

The facts in the Wylie vs. Elwood case are quite different from the facts of this case and the Supreme Court in Wylie vs. Elwood recognize the doctrine laid down in the cases of C. & E. I. R. R. Co. vs. Loeb, supra, and I. C. R. R. vs. Anderson, supra

In Wylie vs. Elwood, supra,

The court at page 290 says: "The doctrine announced in some of the text books, that where land has been acquired for railroad purposes by deed or grant, as well as by condemnation, all damages to the portion of the owner's land not taken,

for which an action would lie at common law, are presumed to have been considered in fixing the price, may well be applied to such a deed or grant made in this State since the constitution of 1870 went into force. That instrument provides that 'private property shall not be taken, or damaged, for public use without just compensation.' But the doctrine can certainly have no reference to a simple deed, made before the adoption of the constitution of 1870 and containing no statement of any use which was to be made of the land conveyed. It is to be noted, that the point here discussed is, not whether there was any remedy for injury to the land not taken before the adoption of the constitution of 1870, but whether damages for such injury could be regarded as paid for by the price named in such a deed, conveying the land taken as the deed above described. We think that such could not be the effect of the deed.

Second, in any case where the doctrine contended for can be applied, it only contemplates that the grantor or those holding under him shall be prevented from recovering damages for such injuries as arise from the proper construction of the road, and such as necessarily result from or attend upon its ordinary and prudent operation. Railroads are a public necessity and a public benefit. Many inconveniences and annoyances grow out of their operation which must be borne by the public. The passage of a train of cars upon the street of a city or town is necessarily attended with noise, with the emission of smoke, with detention at the crossings, etc. No recovering can be had for injuries suffered from such causes.

But a railroad company has the power to do certain things, which it has also the discretion to do in particular ways and at particular places. It needs grounds upon which it may receive and discharge its freight and passengers. It may use its right-of-way for such purposes. Its discharge of a certain kind of freight at one place upon its right of way may work serious injury to property owners, while its discharge of the same at another place thereon may not produce any such injury. The selection of a locality, where damages are inflicted, in preference to one where damages will not be inflicted, cannot be said to be necessary to the ordinary and prudent operation of the road."

In the present case the evidence wholly fails to show that the coal chute was erected in a populous place in the city of Christopher. The only evidence in the record in regard to the matter as to whether or not there were any houses in that vicinity other than appellee's, was the testimony of one of appellee's witnesses who stated that there was some other houses. There is no evidence in the record as to any depreciation on account of the noise incident to the operation of said coal chute. The only evidence is with reference to a depriciation on account of the dust, dirt and smoke. We think in view of the holding of the Courts in this State that where negligence is not charged or not proven in connection with the operation of the instrumentality complained of and where that instrumentality is necessary for the operation of the business for which the premises were conveyed, as railroad purposes, there can be no right of recovery. It might be observed in this case that the evidence shows that a round house had been erected

by appellant, railroad company, and that it was necessary to have a coal chute near said round house. The evidence shows this coal chute was erected on appellant's right-of-way and near said round house.

In I. C. R. R. vs. Anderson, supra, this court at page 627 of said opinion says: "Cases between a railroad company and a grantor or condemnee fall in the same class. In such cases the consideration for the grant or the damages assessed on condemnation include, once for all, the full compensation to be paid for any lawful use that fairly falls within the terms of the grant or the specifications of the condemnation. In the absence of improper manner of construction or negligence in the manner of use the only question in such cases is, are the terms of the grant or the purpose specified in the condemnation broad enough to include the uses complained of?

The terms of Cartwright's grant are clearly broad enough to include the right, in appellant, to construct and use, on its right-of-way, the turntable and switch complained of. C. R. I. & P. Ry. Co. vs. Smith is a leading Illinois case on this subject.

Appellee's counsel contend that it was not necessary to construct the turntable and switch at that particular place. It is in most cases impossible to draw the line between what is necessary and what is convenient. Few things are absolutely necessary; all things convenient are in a sense necessary. In cases of this character that is sufficiently necessary which is more convenient."

For the reasons above set forth we are of the opinion that the court erred in refusing to direct a verdict in favor of appellant. In view of our holding on this assignment of error it is not necessary for us to discuss the other errors assigned.

The judgment is therefore reversed without remanding.

We find as an ultimate fact in this case that the coal chute in question was not shown to have been located in a populous part of the City of Christopher; that no negligence was shown on the part of appellant in the operation of said coal chute and that the same was located on its right of way and operated by appellant in the usual and necessary operation of its business.

Judge Eagleton took no part in the consideration or decision of this case.

Not to be reported.

Term No. 6. Agenda No. 7.

IN THE

APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

March Term A. D. 1920.

APR 1 0 1920

MARY E. CHARLESS, Plaintiff in Error, vs. C. W. TERRY, C. H. BURTON AND CITIZEN'S STATE & TRUST BANK, Defendants in Error.	Error to the Circuit Court of Madison County.

Eagleton, J.

This is a writ of error sued out to review a decree of the Circuit Court of Madison County.

The original bill was filed by C. W. Terry, one of the defendants in error, against Miss Mary E. Charless, the plaintiff in error, and C. H. Burton, trustee, who is also a defendant in error. It was a bill to foreclose a mortgage on four-hundred-twenty acres of land in Madison County, Illinois, securing two notes for the sum of $4,100.00 each dated November 3, 1914, due September 1, 1915, with interest at seven per cent per annum, signed by Mary E. Charless and C. H. Burton, trustee.

Miss Charless filed an answer and also filed a cross bill making C. W. Terry, C. H. Burton and the Citizen's State and Trust Bank of Edwardsville, Illinois, defendants thereto. In the cross bill Miss Charless charged said defendants with exacting unlawful interest, commissions and other excessive charges and praying an accounting against each of them and that a deed to Burton, as trustee, and a declaration of trust by Burton and a deed to Terry be set aside.

To the cross bill the defendants in error filed separate answers, Burton, in his answer, set forth a note for $2,000.00 executed by Miss Charless, December 26, 1911, payable to him one year after date with interest at five per cent and asked that it be decreed a lien on said lands and foreclosed.

Replications were filed and the cause referred to the master in chancery to take and report the evidence with conclusions of law.

After the case has been referred to the master, Miss Charless obtained permission of the court and filed an amendment to her answer in which she set forth that the Citizen's State and Trust Bank made her a loan and exacted $200.00 as commissions and that Terry, president of said bank and Burton, a member of the board of directors thereof, each exacted $500.00 as commissions on said loans and that said sums were included as principal in the notes given by her which were for $20,000.00 and that said notes provided interest at seven per cent and that said notes were usurious. It was further set forth in the amendment that the notes were renewed at various times up to and including the notes in suit and that in each renewal said usurious charges were included and that in addition thereto the sums of $116.67, $386.85 and $496.00 were exacted of her at different times and included in said renewal notes, which

each provided for interest at seven per cent and that all of said excessive charges were included in the notes sued on whereby said notes were usurious.

The master heard the evidence and reported it to the court with his findings. Thereafter the case was referred to a special master and he heard evidence aand made findings as to solicitor's fees, which were duly reported to the court.

Among other things the master found and reported to the court that Burton should be charged with $200.00 paid W. L. Duckles, for the reason it was usurious, and $116.67, $386.85 and $496.00 as excesses in the renewals of the loan from time to time, which findings were sustained by the court and the several amounts charged against Burton in the decree.

To the findings and conclusions of the master and of the special master objections were filed, which were preserved in court by way of exceptions.

All exceptions were overruled by the court except as to a fee of $50.00 which was refused by the master and allowed by the court, to Burton for services as attorney rendered Miss Charless in another case.

In the decree it was found that on July 30, 1917 Miss Charless owed Terry, on the notes secured by the mortgage being foreclosed, after allowing all credits, the sum of $8,957.01, being the principal with interest at seven per cent per annum and that there was due him on the accounting $76.75.

The court also found that the note of $2000.00 from Miss Charless to Burton was valid and binding and that there was due thereon the sum of $2,588.35 and that there was $1,811.62 due Burton on the accounting.

The court entered a decree and ordered the property sold and said sums due Terry and Burton paid from the proceeds, pursuant to the decree the master, on November 28, 1917 sold the mortgaged premises and C. W. Terry became the purchaser. The property sold for $11,582.00 and left a deficiency of $398.15 due Terry and a deficiency of $4,772.27 due Burton for which judgments have been rendered against Miss Charless.

In 1866 the father of Miss Charless dies siezed of the land involved in this litigation and some years later Miss Charless purchased the farm and assumed considerable indebtedness. She borrowed money at intervals from Charles P. Wise and John E. Haynor until the total amount owing them was nearly $18,000.00. Then Miss Charless executed a deed to Wise and Haynor for the farm. After the deed was made Haynor died and a controversy arose between Miss Charless, on the one part, and Wise and the Haynor heirs, on the other, about the deed. Miss Charless claimed the deed was a mortgage and that she had the right to redeem the land, and the other parties claimed it was an absolute conveyance.

In 1910 Miss Charless employed Burton, who is an attorney at law, and he filed a bill, against Wise and the Haynor heirs, to redeem the land. This case was settled June 30, 1911 by an agreement that Miss Charless should have the right to re-invest herself with the title to the farm upon the payment to Wise and the Haynor heirs on or before January 1, 1912, of the sum of $18,500.00 for the debt and interest and $25.00 for rent and a sum not to exceed $200.00 for repairs to be made on the farm by them and Wise and the Haynor heirs placed a deed in

escrow to be delivered to Miss Charless upon said payment being made within said time.

Burton undertook to raise $20,000.00 for Miss Charless to perform the agreement and pay the expense of procuring said loan and, after various efforts that failed, he and Miss Charless went to C. W. Terry, who is also an attorney at law, and procured him to assist in raising the money. Terry and Burton claims Miss Charless agreed to pay them 5 per cent as commissions for procuring the loan. Miss Charless testified she had no recollection of such agreement. On this question the court found in favor of Terry and Burton and allowed Burton credit for $500 each paid himself and Terry.

Terry was a member of the board of directors and president of the Citizen's State and Trust Bank of Edwardsville, Illinois, and Burton was a member of the board of directors and after Terry had been procured to assist in the matter, they went to the Citizen's State and Trust Bank to arrange for a loan. It was found that the bank could not loan Miss Charless the sum desired because of the amount of its capital and surplus. The bank finally agreed to loan her $10,000.00 and to loan $10,000.00 on notes signed by Terry and Burton.

Pursuant to this arrangement on December 26, 1911, Miss Charless executed nine notes to the bank for the sum of $10,000.00 payable on or before one year, with interest at seven per cent and ten notes payable to C. W. Terry for the sum of $10,000.00 due in one year, with interest at seven per cent. On the same day Terry and Burton each with the other as surety, executed a note to the Citizen's State and Trust Bank for the sum of $5,000.00 and placed with each of said notes as collateral security, $5,000.00 of notes executed by Miss Charless to Terry.

With the notes placed by Terry and Burton respectively as collateral security, each signed a statement in which was a description of the notes pledged followed by this statement, "Of which I am, in good faith, the owner."

On the day the loan was made Miss Charless executed a mortgage on the Charless farm to the Bank to secure the notes executed by her, in which the notes were described as notes to the bank for $10,000.00 and notes to Terry for $10,000.00. On the same day Miss Charless executed to C. H. Burton, trustee, a deed subject to said mortgage for the farm.

On instruments executed as above, $20,000.00 was paid Burton, as trustee, for Miss Charless on December 31, 1911 and on the same day he paid himself and C. W. Terry $500.00 each as commissions on the loan and paid $200.00 to W. L. Duckles as commission on said loan. Credit was taken by Burton in his accounts for $200.00 paid Duckles in his individual capacity but the evidence clearly shows he was cashier of the Citizen's State and Trust Bank and that the money was paid to him and he received it as the agent of the bank and that it was paid to the bank as a commission on the loan.

On November 26, 1912, $15,000.00, being the proceeds of a loan made by an insurance company, was applied on the notes executed by Miss Charless to the Bank and to Terry and the amount of the notes to the Bank was paid in full. New notes were, on the same day, executed to Terry for the balance due on the notes originally executed to him, these notes were renewed on November 4, 1913 and again on November 3, 1914,

when the notes now in litigation were given toTerry in renewal of the balance of said debt. By this means the debt to the Bank was fully closed and the question of usury in the notes held by the Bank cannot be raised. However as Burton paid the Bank $200 which was an illegal charge by the Bank and which he had no right to pay he was properly charged therewith in the accounting.

These facts lead to the conclusion that Terry and Burton loaned $10,000.00 to Miss Charless, and the bank loaned her $10,000.00. The conclusion also follows that Terry and Burton failed to procure a loan of $20,000.00 to be made to Miss Charless and that they were not entitled to the commission of $1000.00 thereon which the trial court allowed them. The bank having collected a commission of $200.00 on the loan made by it and having also required the highest legal rate of interest it must be held the $1000.00 collected by Terry and Burton was an usurious charge on the notes given by Miss Charless to Terry.

The case of Sanford et al v. Kane, 133 Ill. 199 is a case in which it was necessary to determine by whom a loan was made and the Supreme Court said: "Looking at the papers executed by the Kanes, and the acts of the parties, the conclusion that it was in fact made by Sanford seems irresistible."

The notes executed by Miss Charless to Terry were payable on or before one year after date and provided for the payment of interest thereon at seven per cent. This was the highest rate of interest allowed by law. The exaction of interest at a greater rate than seven per cent per annum is usury. Terry and Burton each taking a commission of $500.00 they thereby required Miss Charless to pay in excess of seven per cent interest for the use of the money loaned by them. This rendered the notes executed by Miss Charless to Terry usurious.

Sanford v. Kane, supra.

Each set of renewal notes executed as above stated included the full amount of each preceding set of notes and interest thereon at seven per cent per annum and each renewal note providing for interest at seven per cent per annum, hence the usury contained in the original notes executed by Miss Charless to Terry is incorporated in the notes in this case and that being true, the making of new notes does not preclude the defence of usury:

"But settlement and agreement upon the amount due and the giving of a new note do not preclude the defence of usury existing in the original transaction. So long as any part of the original debt remains unpaid the debtor may insist upon the deduction of usury."

Cobe v. Guyer,—237 Ill. 568.

In the case of House v. Davis, 60 Ill. 367—as here—the notes had been renewed repeatedly and the Supreme Court held:

"The notes had frequently been renewed while in the hands of the payee, and the usury computed at each renewal; and if the assignee had notice of the usury, the defence could be made as to him. The notes, upon renewal, were not a satisfaction of the former notes, but only evidence of pre-existing indebtedness."

Plaintiff in error contends that when a note is usurious all interest is forfeited. In discussing to what extent courts of equity will grant relief against usurious contracts, the Supreme

Court in the case of Woodworth et al v. Huntoon et al—40 Ill. 131 held as follows:

"On the one hand, courts of equity will not relieve the debtor by declaring the contract void, and thus aid him in perpetrating a fraud, but will require him to do equity by paying the principal, with legal interest; on the other, it will not aid the usurer in perpetrating a fraud, by enforcing his illegal and unconscionable bargain."

While a former statute was in force the Supreme Court held:

"As to the rate of interest to be computed upon the balance of the debt, after the deduction of the usury, six per cent only should be reckoned."

House v. Davis—60 Ill. 367.

The present statute makes the rate five per cent and that rate was used by the Supreme Court in the case of Garlick v. Mutual Loan and Building Association—236 Ill. 232.

The original notes to Terry being usurious, the taint of usury followed each renewal of the notes and is inclined in the notes in this suit and the court erred in not so holding. In determining the indebtedness due Terry on the notes in this case the original loan by Terry and Burton of December 26, 1911, should be treated as a loan of $9,000.00—Ammondson v. Ryan—111 Ill. 506. Interest should be computed thereon at five per cent per annum and the amount due at each renewal, including the notes in this suit, should be on that basis and interest computed at the same rate.

In the accounting Burton charged himself, as trustee, with $20,000.00 received on the loan of December 26, 1911. The sum of $1,000.00 has been deducted from the principal of the notes of that date given by Miss Charless to Terry and it has been held to be a loan of $9,000.00 for that reason Burton should only be charged with the sum of $19,000 being the $10,000.00 loaned by the Bank and $9,000.00 loaned by Terry and Burton. He took credits in his account, for the sum of $500.00 each paid to Terry and himself. Because of the holding in this opinion, it will not be proper to allow these credits. All other excessive charges, at the renewal of the notes, should be deducted from the principal of said notes and interest computed on the remainder at five per cent.

Complaint is made that the court erred in some of the details of the account on the part of Burton and also on the part of Terry. The master's findings as to Terry's account and except as to one item in the account of Burton were sustained by the court, these findings were made by the master who heard the witnesses testify andn no sufficient reason appears why they should be disturbed, except as to charges against Burton, which are covered by the holding that the original loan was $19,000.00 and as to other charges on renewals of loans that were excessive.

The decree of the Circuit Court is reversed and remanded with directions that the decree of foreclosure and accounting entered in this cause and all subsequent proceedings be set aside and vacated and that a new decree of accounting, foreclosure and for sale be entered conforming to the views herein

expressed and that the usual time for redemption be fixed from the date of sale thereunder.

Reversed and remanded with directions.

Not to be reported in full.

On rehearing we adhere to our former opinion and judgment and order the same refiled.

Reversed and remanded with directions.

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and nineteen the same being the 28th day of October in the year of our Lord, one thousand nine hundred and nineteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. J. C. Eagleton, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. *GRANT IRVIN, Sheriff*

And afterwards, to-wit; On the seventh day of November, A. D. 1919, there was filed in the office of the Clerk of said Court. at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mary E. Charless,
Plaintiff in Error

vs.

No. 4

MARCH TERM, 1919.

C. W. Terry et al,
Defendants in Error

216 I.A. 657

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. E. GILLHAM

Term No. 4. In the Appellate Court Agenda No. 27

of Illinois, Fourth District.

March Term A. D. 1919.

Mary A. Charlesworth, Plaintiff in error.	
vs.	Error to the Circuit Court of Madison County.
G. A. Perry, C. A. Burton and Citizens' State & Trust Bank, Defendants in error.	

216 I.A. 657

Appleton J.

This is a writ of error sued out to review a decree of the Circuit Court of Madison County.

The original bill was filed by G. A. Perry, one of the defendants in error, against Mary A. Charlesworth, the plaintiff in error, and C. A. Burton, trustee, who is also a defendant in error. It was a bill to foreclose a mortgage on two-hundred-twenty acres of land in Madison County, Illinois, securing two notes for $4,1[illegible] each dated October 7, 1914, due September 1, 1915, with interest at seven per cent per annum, payable by Mary A. Charlesworth to C. A. Burton, trustee.

Mrs. Charlesworth filed an answer and also filed a cross bill making G. A. Perry, C. A. Burton and the Citizens' State and Trust and of Edwardsville, Illinois, defendants thereto. In the cross bill Mrs. Charlesworth charged fraud against defendants with exacting unlawful interest, commissions and other excessive charges and praying an accounting against each of them and that a deed to Burton, as trustee, and a declaration of trust by Burton and a deed to Perry be set aside.

To the cross bill the defendants in error filed separate answers, Burton, in his answer, set forth a note for $2,000.00 executed by Miss Charlesa, December 16, 1911, payable to him one year after date with interest at five per cent and asked that it be secured a lien on said lands and foreclosed.

Replications were filed and the cause referred to the master in chancery to take and report the evidence with conclusions of law.

After the case has been referred to the master, Miss Charlesa obtained permission of the court and filed an amendment to her answer in which she set forth that the Citizen's State and Trust bank made her a loan and exacted $200.00 as commissions and that Berry, president of said bank and Burton, a member of the board of directors thereof, each exacted $50.00 as commissions on said loan and that said sums were included as principal in the notes given by her which were for $2,000.00 and that said notes provided interest at seven per cent and that said notes were usurious. It was further set forth in the amendment that the notes were renewed at various times up to and including the notes in suit and that in each renewal said usurious charges were included and that in addition thereto the sums of $116.67, $386.65 and $496.00 were exacted of her at different times and included in said renewal notes, which each provided for interest at seven per cent and that all of said excessive charges were included in the notes sued on whereby said notes were usurious.

The master heard the evidence and reported it to the court with his findings. Thereafter the case was referred to a special master and he heard evidence and made findings

as to solicitor's fees, which were duly reported to the court.

Among other things the master found and reported to the court that Burton should be charged with [illegible] paid W. L. Buckles, for the reason it was usurious, and $116.67, $786.86 and $496.[illegible] as excesses in the renewals of the loan from time to time, which findings were sustained by the court and the several amounts charged against Burton in the decree.

To the findings and conclusions of the master and of the special master objections were filed, which were preserved in court by way of exceptions.

All exceptions were overruled by the court except as to a fee of $[illegible] which was refused by the master and allowed by the court, to Burton for services as attorney rendered Miss Charlese in another case.

In the decree it was found that on July 3, 1917 Miss Charlese owed Terry, on the notes secured by the mortgage being foreclosed, after allowing all credits, the sum of $8,957.01, being the principal with interest at seven per cent per annum and that there was due him on the accounting $76.75.

The court also found that the note of $[illegible] from Miss Charlese to Burton was valid and binding and that there was due thereon the sum of $[illegible],86[illegible].35 and that there was $1,811.62 due Burton on the accounting.

The court entered a decree and ordered the property sold and said sums due Terry and Burton paid from the proceeds, pursuant to the decree the master, on November 26, 1917 sold the mortgaged premises and [illegible] Terry became the purchaser. The property sold for $11,582.00 and left a deficiency of $795.15 due Terry and a deficiency of $4,772.27 due Burton for which judgments have been rendered against Miss Charlese.

In 1866 the father of Miss Charlesse died seized of the land involved in this litigation and some years later Miss Charlesse purchased the farm and assumed a considerable indebtedness. She borrowed money at intervals from Charles W. Wise and John [illegible] Haynor until the total amount owing them was nearly $18,000. Then Miss Charlesse executed a deed to Wise and Haynor for the farm. After the deed was made Haynor died and a controversy arose between Miss Charlesse, on the one part, and Wise and the Haynor heirs, on the other, about the deed. Miss Charlesse claimed the deed was a mortgage and that she had the right to redeem the land, and the other parties claimed it was an absolute conveyance.

In 1911 Miss Charlesse employed Burton, who is an attorney at law, and he filed a bill, against Wise and the Haynor heirs, to redeem the land. This case was settled June 3, 1911 by an agreement that Miss Charlesse should have the right to re-invest herself with the title to the farm upon the payment to Wise and the Haynor heirs on or before January 1, 1912, of the sum of $18,000 for the debt and interest and $700.00 for rent, or a sum not to exceed $2,000 for repairs to be made on the farm by them and Wise and the Haynor heirs placed a deed in escrow to be delivered to Miss Charlesse upon said payment being made within said time.

Burton undertook to raise $2,000.00 for Miss Charlesse to perform the agreement and pay the expense of procuring said loan and, after various efforts that failed, he and Miss Charlesse went to [illegible] Terry, who is also an attorney at law, and procured him to assist in raising the money. Terry and Burton claim Miss Charlesse agreed to pay them 5% as commissions for procuring the loan. Miss Charlesse testified she had no recollection of such agreement. On this question the court found in favor of Terry and Burton

and allowed Burton credit for $5[illegible] each said himself and Terry.

Terry was a member of the board of directors and president of the Citizen's State and Trust Bank of Edwardsville, Illinois, and Burton was a member of the board of directors and, after Terry had been procured to assist in the matter, they went to the Citizen's State and Trust Bank to arrange for a loan. It was found that the bank could not loan Miss Charless the sum desired because of the amount of its capital and surplus. The bank finally agreed to loan her $1[illegible],000.00 and to loan $1[illegible],000.[illegible] on notes signed by Terry and Burton.

Pursuant to this arrangement on December 26, 1911, Miss Charless executed nine notes to the bank for the sum of $10,000.00 payable on or before one year, with interest at seven per cent and ten notes payable to C. [illegible] Terry for the sum of $10,000.00 due in one year, with interest at seven per cent. On the same day Terry and Burton each with the other as surety, executed a note to the Citizen's State and Trust Bank for the sum of $5,000.00 and placed with each of said notes as collateral security, $5,000.00 of notes executed by Miss Charless to Terry.

With the notes placed by Terry and Burton respectively as collateral security, each signed a statement in which was a description of the notes pledged followed by this statement, "Of which I am, in good faith, the owner."

On the day the loan was made Miss Charless executed a mortgage on the Charless farm to the Bank to secure the notes executed by her, in which the notes were described as notes to the Bank for $10,000.00 and notes to Terry for $10,000.00. On the same day Miss Charless executed to C. H. Burton, trustee, a deed subject to said mortgage for the farm

On instruments executed as above, $2[illegible], [illegible] was paid Burton, as trustee, for Miss Charlesa on December 31, 1911 and on the same day he paid himself and [illegible]. Terry $5[illegible] each as commissions on the loan and paid $[illegible] to [illegible] Buckles as commission on said loan. Credit was taken by Burton in his accounts for $2[illegible] paid Buckles in his individual capacity but the evidence clearly shows he was cashier of the Citizen's State and Trust Bank and that the money was paid to him and he received it as the agent of the bank and that it was paid to the bank as a commission on the loan.

On November [illegible], 1912 $15,[illegible], being the proceeds of a loan made by an insurance company, was applied on the notes executed by Miss Charlesa to the bank and to Terry and the amount of the notes to the bank was paid in full. New notes were, on the same day, executed to Terry for the balance due on the notes originally executed to him, these notes were renewed on November 4, 1913 and again on November 3, 1914, when the notes now in litigation were given to Terry in renewal of the balance of said debt. By this means the debt to the bank was fully closed and the question of usury in the notes held by the bank cannot be raised. However as Burton paid the bank $2[illegible] which was an illegal charge by the bank and which he had no right to pay he was properly charged therewith in the accounting.

These facts lead to the conclusion that Terry and Burton loaned $1[illegible] to Miss Charlesa, and the bank loaned her $1,[illegible]. The conclusion also follows that Terry and Burton failed to procure a loan of $2[illegible],[illegible] to be made to Miss Charlesa and that they were not entitled to the commission of $100.[illegible] thereon which the trial court

allowed them. The bank having collected a commission of $20.00 on the loan made by it and having also required the highest legal rate of interest it must be held the $10.00 collected by Terry and Burton was an usurious charge on the notes given by Miss Charlesse to Terry.

The case of Lanford et al v. Hane, 137 Ill. 199 is a case in which it was necessary to determine by whom a loan was made and the Supreme Court said: "Looking at the papers executed by the Hanes, and the acts of the parties, the conclusion that it was in fact made by Lanford seems irresistible."

The notes executed by Miss Charlesse to Terry were payable on or before one year after date and provided for the payment of interest thereon at seven per cent. This was the highest rate of interest allowed by law. The exaction of interest at a greater rate than seven per cent per annum is usury. Terry and Burton each taking a commission of $5.00 they thereby required Miss Charlesse to pay in excess of seven per cent interest for the use of the money loaned by them. This rendered the notes executed by Miss Charlesse to Terry usurious.

Lanford v. Hane, supra.

Each set of renewal notes executed as above stated included the full amount of each preceding set of notes and interest thereon at seven per cent per annum and each renewal note provided for interest at seven per cent per annum, hence the usury contained in the original notes executed by Miss Charlesse to Terry is incorporated in the notes in this case and that being true, the making of new notes does not preclude the defence of usury:

"But settlement and agreement upon the amount due and the giving of a new note do not preclude the defence of usury existing in the original transaction. So long as any

part of the original debt remains unpaid the debtor may insist upon the deduction of usury."

Cobe v. Guyer, - 237 Ill. 568.

In the case of House v. Davis, 60 Ill. 367 - as here - the notes had been renewed repeatedly and the Supreme Court held:

"The notes had frequently been renewed while in the hands of the payee, and usury computed at each renewal; and if the assignee had notice of the usury, the defence could be made as to him. The notes, upon renewal, were not a satisfaction of the former notes, but only evidence of pre-existing indebtedness."

Plaintiff in error contends that when a note is usurious all interest is forfeited. In discussing to what extent courts of equity will grant relief against usurious contracts, the Supreme Court in the case of Goodworth et al vs. Huntoon et al - 40 Ill. 121 held as follows:

"On the one hand, courts of equity will not relieve the debtor by declaring the contract void, and thus aid him in perpetrating a fraud, but will require him to do equity by paying the principal, with legal interest; on the other, it will not aid the usurer in perpetrating a fraud, by enforcing his illegal and unconscionable bargain."

While a former statute was in force the Supreme Court held:

"As to the rate of interest to be computed upon the balance of the debt, after the deduction of the usury, six per cent only should be reckoned."

House v. Davis - 60 Ill. 367.

The present statute makes the rate five per cent and that rate was used by the Supreme Court in the case of

Garlick v. Mutual Loan and Building Association-236 Ill.232.

The original notes to Terry being usurious, the taint of usury followed each renewal of the notes and is included in the notes in this suit and the court erred in not so holding. In determining the indebtedness due Terry on the notes in this case the original loan by Terry and Burton of December 26, 1911, should be treated as a loan of $[illegible] - Andersen v. Ryan - 111 Ill. 56. Interest should be computed thereon at five per cent per annum and the amount due at each renewal, including the notes in this suit, should be on that basis and interest computed at the same rate.

In his accounting Burton charged himself, as trustee, with $[illegible] received on the loan of December 26, 1911. The sum of $[illegible] has been deducted from the principal of the notes of that date given by Lee Charlesse to Terry and it has been held to be a loan of $[illegible]. For that reason Burton should only be charged with the sum of $[illegible] being the $[illegible] loaned by the bank and $[illegible] loaned by Terry and Burton. He took credits in his account, for the sum of $[illegible] each paid to Terry and himself. Because of the holding in this opinion, it will not be proper to allow these credits. All other excessive charges, at the renewal of the notes, should be deducted from the principal of said notes and interest computed on the remainder at five per cent.

Complaint is made that the court erred in some of the details of the account on the part of Burton and also on the part of Terry. The master's findings as to Terry's account and except as to one item in the account of Burton

were sustained by the court, these findings were made by the master who heard the witnesses testify and no sufficient reason appears why they should be disturbed, except as to charges against [illegible], which are covered by the finding that the original loan was [illegible], [illegible] and as to other charges on renewals of loans that were excessive.

The decree of the circuit court is reversed and remanded with directions that the decree of foreclosure and accounting entered in this cause and all subsequent proceedings be set aside and vacated, and that a new decree of accounting, foreclosure and for sale be entered conforming to the views herein expressed and that the usual time for redemption be fixed from the date of sale thereunder.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this ..... day of A. D. 191 ....

.....

Clerk of the Appellate Court

OPINION

FEE, $:

Term No. 16. Agenda No. 39.

October Term 1919.

LOUIS F. BUSEKRUS and ANNA BUSEKRUS,
Defendants in Error,
v.
CONSOLIDATED OIL REFINING COMPANY and A. SWATON,
Plaintiffs in Error.

Error to St. Clair.

216 I.A. 657

Eagleton, J.

Defendants in error brought their suit to the April Term 1917 of the Circuit Court of St. Clair County, Illinois, praying an injunction against Consolidated Oil Company and A. Swaton. The Bill as amended alleged that Defendants in error had been the owners in fee of residence property in the City of East St. Louis for a period of more than five years prior to the filing of the original bill; that the Consolidated Oil Company is a corporation engaged in the business of handling petroleum distillates, and oil in large quantities on certain premises described and located near the residence of Defendants in error; that the plant of said oil company was established in the spring of 1916, and has been constantly operated since that time: that said Company stores on its premises, and in its plant large quantities of petroleum distillates for the purpose of extracting therefrom certain substances known as benzine, naphtha and gasoline which are very volatile commodities, and are highly inflamable, and likely to explode whenever a spark of fire comes in contact therewith. The Bill then more particularly describes the nature and construction of the plant, its capacity and manner of operating and then charges that the Plant emits gases that are highly explosive and extremely dangerous to persons living in vicinity; that the home of Defendants in Error is a distance of 500 feet from the plant and is in constant danger from the liklihood of such gases, benzine, naphtha and gasoline exploding;" that "there are large volumes of hot, sickening, suffocating and nauseating odors, fumes, smoke, soot, gases and stenches emitted from said plant of the defendants to and upon and into the dwelling house, personal property and premises of your orators and the dwelling houses, personal property and premises of all of the residents of said neighborhood, which causes such depreciation in value of your orators' property, as to make it almost entirely worthless and unsalable and damages all of said personal property and that such stenches, smoke, gases, soot and odors permeate the rooms of your orators' dwelling and causes them and their family uneasiness, discomfort, nausea, headaches and sickness, so that they cannot rest or sleep and causes their sleep to be disturbed and to be awakened from their sleep in the night time because of such intolerable, sickening, suffocating, nauseating stenches, odors, fumes and gases, whereby the health of your orators and their families is impaired, their sleep and rest at night disturbed and destroyed and the ordinary physical comforts in and around their home are denied them because of the presence, operation, use and conducting of said business by the defendants in the manner aforesaid be-

coming an intolerable nuisance." It is further alleged that A. Swatson, a party Defendant, was the Superintendent in charge of the Plant. The Bill prays "that upon a hearing hereof the Court may declare the operation and maintenance of such plant, furnaces, coils, tanks, smokestackes and the storage of large quantities of petroleum distillates, benzine, naphtha, gasoline and oils that are likely to catch on fire or explode, and the conduct of the business of the defendants in such a manner as to produce nausating, sickening, suffocating stenches, odors, gases and smoke in such quantities as to destroy the rest of your orators and their family or their comfortable enjoyment of their dwelling house and premises or to cause them headaches, nausea, suffocation and discomforts of like character, may be declared by this Honorable Court to be a nuisance, and that the defendants and each of them be perpetually enjoined and restrained by the order and injunction of this Honorable Court from operating or maintaining such plant, takes, furnaces, smoke stacks, coils and petroleum distillates, benzine, naphtha, gasoline and oil so as to be likely to catch on fire and burn and explode and from operating or maintaining such plant, storage tanks, iron or steel receptacles, furnaces, smoke stacks, coils and the like, about said plant in such a manner as to emit foul, nauseating, suffocating odors, stenches, gases, soot and smoke so as to destroy the rest and sleep of your orator and his family and to cause them such physical discomforts as to make your orators' dwelling house unfit for habitation." To this amended Bill the Consolidated Oil Company filed an answer admitting the ownership and operation of the Plant, but substantially denying all the material averments of the amended Bill. The Defendant, A Swaton filed a short answer denying any interest in the Consolidated Oil Company except as an employee, and denying that he was superintendent in charge of the Plant, or the operation thereof. After the filing of replication the cause came on to be heard before the Court on April 1, 1918 and after the hearing it was taken under advisement by the Court, and not decided until the 20th day of June 1919. At that time the Court entered a decree finding the facts substantially as alleged in the amended bill, and ordering that the "Defendants and each of them is hereby perpetually enjoined and restrained from operatinng the oil works Plant, furnaces, coils, tanks, equipment and process in the distillation reducing or treatment of petroleum distillates or oil in the production or separation of benzine, naphtha, and gasoline therefrom on," here describing defendants in error's premises. After the Court announced its decision, the Defendant in error, Oil Company, which in the decree is called Consolidated Oil Refining Company, filed its verified motion to vacate the order and decree of the Court, and asked that it might be permitted to re-argue the case, or if the motion to reopen and re-argue the cause should be denied that the decree of th Court might be modified and "changed by giving to the Oil Company one year within which to seek a new location, or at least three weeks in which to dispose of the distillates then on hand. The Court having heard oral testimony both for and against this motion rendered a further decree finding that the Oil Company had in its Plant about 125,000 gallons of Gasoline, that since January 1, 1919 there had been 3 fires in the plant, and that one of the fires was accompanied by an explosion of

a tank; and that the heat from such fire was so intense that it cracked the glass of the windows in a dwelling house just across the street from Defendant in error's residence. The motion of the Oil Company was denied, and this writ of error has been sued out of reverse that decree. It appears from the evidence that the Plant of the Plaintiff in error, Oil Company, is a new process for extracting gas and benzine known as the Green street process; that under this process additional gasoline and benzine are extracted from distillates from which gasoline and benzine have already been extracted by the old process and the effect of the new process is to largely increase the supply of gasoline in this Country. It also, seems that the plant in question is not so much a manufacturing Plant as it is a demonstrating plant; that persons desiring to secure the right to use this patent process may see the plant in actual operation, and the evidence heard on the motion to modify the decree shows persons have come from various parts of the world to investigate the methods here used. It further appears from the evidence that $300,000.00 have been invested in this plant, and that it would take a year to secure a new location and build a new building. It is contended by plaintiffs in error that a year's delay would result in damage to the Company of $5,000,000. and it was to save this damage that leave to operate for one year was asked.

On the trial of the case more than ninety witnesses were called. These witnesses were nearly equally divided in numbers between the parties. Those on behalf of the complainants being slightly the larger. Most of the witnesses called by the complainants resided in the immediate vicinity of the home of the complainants and many of them owned the properties in which they lived. A number of witnesses called by the defendants resided in the immediate neighborhood of the refinery, some of whom also owned the property occupied by them. In addition to these other witnesses were called by the defendants who were engaged in business rquiring their presence near the refinery either the greater part of the time or at frequent intervals. The defendants also called a number of witnesses who had made visits to the plant for the purpose of acquainting themselves with the conditions existing. Among the latter class of witnesses were two physicians, several men engaged in the real estate business, ice and coal dealers and men engaged in different enterprises. The testimony is voluminous and within the reasonable limits of an opinion cannot be considered in detail nor in fact would such consideration be of any particular value. For those reasons only the salient points in the testimony will be set forth.

It appears that the refinery was installed in the year 1915, and that the original bill of complaint in this cause was filed March 29, 1917 and an amended bill, on which the case was tried, was filed April 1, 1918. It also appears that the plant was first operated in August 1915 and that the defendant Consolidated Oil Refining Company took charge thereof in December 1915, and had been operating the plant continuously to the date of the trial April 1, 1918.

It appears from the evidence that the stock yards are about one and one half miles from the refinery, that there is a gas plant not far away and that there are other manufacturing

concerns located close by the various railroad tracks run near the refinery.

The complainants testified that there was a large amount of smoke blown into their home from the refinery when the wind was in the right direction and that an oily substance accumulated on their household furnishings which they said was carried in the smoke. They also testified that strong fumes were sometimes blown to their home which were nauseating, that these fumes caused them to be sick at the stomach and frequently when sleeping they would be awakened thereby and would have a sickening taste in their mouth and would be caused to cough and would often have to close the windows to their sleeping room in order to keep the fumes out.

They also testified that the fumes, smoke and grease prevented vegetation growing around their premises and that while they formerly had a beautiful lawn it was all gone and that their flowers were destroyed and a hedge set out by them did not live.

Many of the neighbors of the complainants testified to similar conditions about their respective homes.

A significant statement was made by the complainant, Louis F. Busekrus, which he was testifying. In reply to a question as to where the grease complained of came from he answered "Well, it must be carried in the fumes." To this answer an objection was sustained. He then said, "The smoke, I think, carries the oily substance. He further said "I do know where these gases come from of my own knowledge. . . . . I simply assume they come from that plant."

Many witnesses called by the complainants testified that sometimes the fumes would be accompanied by smoke and that at other times the fumes would be present without the smoke.

In attempting to describe the fumes and odors testified about by the witnesses for the complainants many comparisons were made, some saying it was sharp, others that it smelled like gasoline or coal oil and others that it smelled like crude oil.

One of the witnesses for the complainants, M. G. Rogers, testified they got smoke and stench from all the other factories around there and from the stock yards and gas plant, that they have a gas odor that had been coming for ten years but he did not know where it came from.

On behalf of the defendants certain residents of the neighborhood testified that while at times there was smoke from the refinery they suffered no inconvenience therefrom and had no sickness in their families occasioned thereby. Witnesses who were engaged in business either in that neighborhood or that brought them frequently thereabout said they noticed no unusual ordors coming from the plant.

As above stated a number of witnesses visited the plant while it was running at the request of the defendants and made trips around and through the plant and were shown the various devices and equipment therein and the method of the operation of the plant and these witnesses testified there was either no unusual odors or if any they were very slight. The two physicians above mentioned testified they noticed no odor or gases that would be deleterious to the health of normal persons.

Many witnesses called on behalf of the defendants described the conditions in East St. Louis as to smoke and

odors coming from different businesses and industries and that in the locality of the refinery and various other parts of the city odors and smoke which do not come from the refinery are present, forming frequently almost a cloud.

As to vegetation witnesses testifying for the defendants stated they had raised crops of grain and vegetables in the immediate neighborhood of the refinery and that they had good yields.

On the trial the court found that there was great danger of fires and explosions because of the business carried on in the refinery. One explosion in particular is shown on which great stress is laid.

On this question William H. Hildebrand testified on behalf of the defendants that there were three fires that he remembered within the preceding year. One of them was caused by the overflow of a steam vaccum valve. It took about thirty minutes to put that fire out. Another was a kerosene distillate tank and lasted about twenty minutes. The last occurred the week prior to the trial. In none of these fires was there serious damage done to the plant and none to the complainants' property. In addition to this the undisputed testimony shows the plant is insured to the amount of $72,000.00 at a premium of $2.50 per $100.00 and that the defendant Oil Company has no trouble in procuring insurance at that rate.

As to explosions occurring the principal ground of complaint in this regard is an explosion in which one Weindel was injured. This seems to have been an explosion of a drum while an employee was welding a bumping bar to an automobile and was in no way connected with the refining of oil.

The last matter to be considered is as to an open sewer claimed to have been used in the discharge of refuse matter from the refinery. In the first place there is no allegation in the amended bill as to the open sewer. On the other hand there was the same conflict in the evidence on this proposition as there was as to fumes etc. in the operation of the refinery.

This leads to a consideration of the question as to whether the proof shows the refinery as operated, to have been such a nuisance as will authorize a court of equity to abate the same in the first instance at the suit of an individual.

The larger part of the testimony was on the question of fumes and gases. The burden was on the complainants to establish two propositions. These were that the fumes and gases were deleterious to the health of normal persons and that they came from the refinery. In considering these questions the location of the refinery with reference to other industries and enterprises must be considered.

The complainants cite the case of Wahle v. Runbach, 76 Ill. 322 in support of their position that the injunction was property issued. Great stress is laid on this case as being conclusive on the rights of the parties. In that case the nuisance involved was a privy which is a nuisance per se. A refinery is not a nusiance per se. It is true a refinery may become a nusiance and when it is a court of equity will in a proper case abate it. Courts of equity, however, proceed cautiously when it is sought to abate, as a nuisance, a business enterprice. The rule is, "That the restraining power of a court of equity, by injunction, may be invoked by a private individual, to prevent a special injury by the erection or continuance of a nuisance.

But it is equally well settled, that the jurisdiction is always reluctantly exercised, until the nuisance has been found t exist by a jury and never unless both the nuisance and the resulting injury are clearly shown by the evidence." Nelson v. Mulligan, 151 Ill. 462 and City of Pana v. Washed Coal Co., 260 Ill. 124.

The Appellate Court in Oehler v. Levy, 139 Ill. App. 301 quoted with approval from the Supreme Court of Pennsylvania as follows: "A court exercising the power of a chancellor, whose arm may fall with crushing force upon the every day business of men, destroying lawful means of support and diverting property from legitimate uses, cannot approach such cases as this with too much caution. Its aid is not of right but by grace, and it must be sure that the exercise of this kingly power is just right and proper before it takes from a citizen his means of livlihood and destroys the value of his property for legitimate uses."

In the City of Pana v. Washed Coal Co., supra, our Supreme Court held as follows: "The general rule formerly strictly enforced was that a court of equity would not interfere to restrain a nuisance unless the right to do so was first established in a court law; but this rule has been somewhat relaxed in modern times and when the case is clear so as to be free from substantial doubt as to the right to relief, or it is evident that a nuisance per se exists, equitable relief may be granted without first resorting to an action at law."

In that case there was considerable evidence as to conditions and odors but after a thorough consideration thereof the Supreme Court held the question was a proper one to be submitted to a jury.

They also held in that case that a party may by his laches preclude himself from complaining against a nuisance. It was also held that people who live in a city must submit to the annoyances of city life where smells and odors are complained of as nuisances and said "In this character of cases an amount of gas or odor which by reason of the diversity of population, the residental character of the neighborhood or otherwise, might amount to a nuisance in one locality, under different circumstances in another locality might be entirely proper and unobjectionable." See also Sutton v. Findlay Cemetery Assn. 270 Ill. 11.

From the evidence introduced it cannot be said that such a nuisance existed as authorized a court of equity to interfere. The question as to the ill effects of gases was controverted, that the gases and fumes complained of came from the refinery is not satisfactorily proven nor does the property appear to be unusually susceptible to fire nor explosives. In fact it appears from the evidence that while small fires have occurred they have been quickly subdued and this evidence disputes the contention that the fluids manufactured by the company are highly inflammable and permitted to freely escape else the result with the fires must have been disastrous.

The question as to whether the refinery is a nusiance should be submitted to a jury in a suit at law, and the decree entered is reversed.

Reversed.

Not to be reported.
Higbee, J.

I dissent from the opinion of the majority of the Court for the reason that it appears to me to have been clearly shown by the proofs that the operation of the plant of the oil company caused irreparable injury to defendants in error and that the case is governed by the rules of law laid down in Wahle v. Reinbach 76 Ill. 322, and Wente v. Commonwealth Fuel Company, 232 Ill. 526; and that under such rules it would be unnecessary in order to give the complainants relief in equity, that they first establish the character of the alleged nuisance by a suit at law.

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